LIBRARY
REME COURT, U. S.

FILED
NOV 24 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 827

TAMPA PHOSPHATE RAILROAD COMPANY,
Petitioner,

-vs-

SEABOARD COAST LINE RAILROAD COMPANY
Respondent.

PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES B. MCDONOUGH, JR.
DAVID C. G. KERR
of MACFARLANE, FERGUSON, ALLISON AND KELLY

Attorneys for Petitioner,
Tampa Phosphate Railroad Company

512 Florida Avenue, P.O. Box 1531
Tampa, Florida

FREE PRESS PUB. CO., INC. - TAMPA

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	8
Constitutional Provisions and Statutes Involved	9
Statement of the Case	19
The IMC Proceedings	29
Reasons Relied on for the Allowance of the Writ	31
POINT I — THE OPINION OF THE COURT OF APPEALS CHANGED THE CHARACTER OF THE INJUNCTION AND TERMINATED THE LITIGATION	31
POINT II — THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT	34
POINT III — THE DECISION OF THE COURT OF APPEALS DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE BY THIS COURT OF ITS POWER OF SUPERVISION	36

CONTENTS — Continued

Page

POINT IV —

§ 1(20) AND §§ 2321-2325 AS NOW CONSTRUED, BY DENYING TO TAMPA ANY JUDICIAL DETERMINATION OF THE JURISDICITION OF THE COMMISSION DENY TAMPA DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 37

POINT V —

THE CONSTRUCTION OF § 1(20) AND §§ 2321-2325 AS OUSTING THE STATE COURTS OF THEIR OWN JURISDICTION IN EMINENT DOMAIN PROCEEDINGS INVADES THE RESERVED POWERS OF THE STATES IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 39

POINT V —

THE OPINION OF THE COURT OF APPEALS PRESENTS SERIOUS QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SOULD BE, SETTLED BY THIS COURT 40

CONCLUSION 41

CERTIFICATE OF SERVICE 42

TABLE OF CITATIONS

Page

American Construction Co. v. Jacksonville T & K. W.R. Co., 148 U. S. 372, 13 S. C. 758, 37 L.Ed. 486 (1893). 32

Chaflin v. Houseman, 93 U. S. 130, 23 L.Ed. 833 (1876) 34,35

Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, 41 S. Ct. 638, 65 L.Ed. 638 (1921) 39

Douglas v. Jeanette, 319 U. S. 157, 63 S. Ct. 877, 87 L.Ed. 1324 39

Dowd Box Co. v. Courtney, 368 U. S. 502, 82 S. Ct. 519, 7 L.Ed. 2d 483 (1962) 34

Gelpecke v. City of Dubuque, 1 Wall. 175, 17 L.Ed. 520 (1864) 39

Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (CA 2nd, 1953) 32

Healy v. Ratta, 292 U. S. 263, 54 S. Ct. 700, 78 L.Ed. 1248 39

I.C.C. v. Atlantic Coast Line R. Co., 383 U. S. 576, 86 S. Ct., 1000 16 L.Ed. 2d 109 (1966) 41

Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 58 S. Ct. 459, 82 L.Ed. 638 (1938) .. 32

Montana Nat. Bank v. Yellowstone County, 276 U. S. 499, 48 S. Ct. 331, 72 L.Ed. 673 (1928) . 39

Piedmont & Northern R. Co. v. United States, 280 U. S. 469, 74 L.Ed. 551 (1930) 38

Railroad Yardmasters v. Pennsylvania Railroad Co., 224 F.2d 226 (CA 3rd, 1955) 32

Rochester Telephone Corp. v. United States, 307 U. S. 125, 59 S. Ct. 754, 83 L.Ed. 1147 (1939) 38

CITATIONS—Continued

Page

Romero v. International Term. Operat. Co.,
358 U. S. 345, 79 S. Ct. 468, 3 L.Ed. 2d 368 (1959) 37

Seaboard Air Line Ry. Co. v. Tampa Southern R. Co.,
121 So. 477 (Sup. Ct. Fla. (1929)) 35

State of Florida v. Manatee County,
193 So. 2d 162 (December 14, 1966, rehearing denied January 23, 1967) 27

Texas & Pacific R. Co. v. Gulf S. & S.F.R. Co.,
270 U. S. 266, 70 L.Ed. 578 (1926) 37,38

Textile Workers Union v. Lincoln Mills,
353 U. S. 448, 1 L.Ed. 2d 972 (1957) 35

T. Smith & Son, Inc. v. Williams,
275 F.2d 397 (CA 5th, 1960) 36

United States v. Idaho,
298 U. S. 105, 80 L.Ed. 1070 (1936) 27,38

TABLE OF CONSTITUTIONAL AND STATUTORY PROVISIONS

Page

Constitution of the United States

Amendment V 8,9

Amendment X 8,9

5 U.S.C.A. § 554(e) 29

28 U.S.C.A. § 1254(1) 7

28 U.S.C.A. § 1292 6

28 U.S.C.A. § 2108 1

28 U.S.C.A. § 2283 2,32,33,11

28 U.S.C.A. § 2321-2325 3,7,8,11,12,13,32,36

29 U.S.C.A. § 185(a) 34

49 U.S.C.A. § 1(18) 5,6,9,34,36,39

49 U.S.C.A. § 1(20) 3,5,6,8,10,34,36,37,38,39,40

49 U.S.C.A. § 1(22) 11,24,35,36

Florida Constitution, Article V, §§ 1 and 6(3) 2

Florida Statutes Annotated

§§ 73.012, 73.021, 73.151 2,13,14

§ 360.01 2,15,16,17,18

§ 361.01 2,18

IN THE

Supreme Court of the United States

October Term, 1969

NO. _____

TAMPA PHOSPHATE RAILROAD COMPANY,
Petitioner,
vs.
SEABOARD COAST LINE RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Tampa Phosphate Railroad Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on October 1, 1969, and its judgment of October 24, 1969, denying rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals and the concurring opinion of Chief Judge Brown are not yet officially reported and neither is the opinion upon denial of rehearing. The matter required to be appended to or to accompany the petition, by Rule 23 1(i) of the Supreme Court Rules, including those opinions, is voluminous and pursuant to the permission of the Rule is separately presented as an Appendix to the Petition. References (A.) are to this Appendix to the Petition which includes a copy of the affidavit filed with the Court of Appeals pursuant to 28 U.S.C. §2108 showing the presence of the jurisdictional amount in one of the state court cases. References (R.) are to the Transcript of Record as certified to this court by the Clerk of the Court of Appeals.

JURISDICTION

The District Court on December 14, 1967 (A. 156) in a suit brought by Seaboard enjoined the prosecution in the Florida courts of three pending actions brought in 1965 by petitioner, Tampa Phosphate Railroad Company (Tampa), to acquire by condemnation under the applicable state statutes (F.S.A. §§ 73.012, 73.021, 73.151, 360.01 and 361.01) (A.7) the right to cross with its proposed track the rights of way and tracks of respondent, Seaboard Coast Line Railroad Company (Seaboard) at four different points of crossing.

One suit covering two crossings was pending in the Circuit Court of Polk County, Florida, and was set for trial on December 18, 1967 (A. 152) on the issue of Tampa's right to condemn, and two separate suits covering one crossing each were pending and at issue in the Circuit Court of Hillsborough County, Florida (Original petitions at R. 345, 473, 498).

The circuit courts in Florida are courts of original general jurisdiction (Florida Const. Art. V, Sections 1 and 6(3)). The injunction specifically mentioned by case numbers the three state court proceedings (A. 158-159). Tampa resisted the injunction on the ground, among others, that it would be in violation of 28 U.S.C.A. § 2283 (§ 2283) (R. 135-138).

The Court of Appeals held that the injunction was contrary to 28 U.S.C.A. § 2283 (§ 2283) unless it fell (A 10), "* * * within one of the exceptions authorized by the statute itself."[1]

---

[1]28 U.S.C.A. §22832: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The District Court was of the view that 49 U.S.C.A. § 1(20) (§ 1(20)) conferred upon it exclusive jurisdiction to determine whether interstate commerce was involved (R. 152), and held that the injunction came within the "in aid of its jurisdiction" exception (A. 10, R. 292) and made no mention of 28 U.S.C.A. §§ 2321-2325 (§§ 2321-2325). The Court of Appeals "without assaying the merit of this rationale" (A. 11), upheld the injunction on the ground that it could issue under the "expressly authorized by Act of Congress" exception of § 2283 (A. 11), and found such express authority in § 1(20) (A. 12), assisted by §§ 2321-2325 (A. 25).

During the pendency of the state court actions the Interstate Commerce Commission (Commission) by order dated August 7, 1967 adopted the findings and conclusions of a hearing examiner on matters of fact and law, including among others, that Tampa's proposed construction and operation would be in interstate commerce, and over Tampa's initial and unwavering objections that it was without jurisdiction, the Commission denied Tampa a certificate of convenience and necessity therefor (A. 6, R. 147). The examiner's proposed report and order and the order of the Commission are set out in full in the Appendix (A. 43-146 and 147-150), including the examiner's discussion of the jurisdictional issues (A. 116-121).

Upon the coming down of the Commission's order Tampa abandoned any effort to secure interstate authority (A. 157). Instead, in September of 1967, the following month, it amended its petitions in the state courts to allege among other things that it would operate only in intrastate commerce (R. 406), that it would not be a carrier subject to Part I of the Interstate Commerce Act (Act) and that it would not engage in transportation subject to Part I of the Act (R. 490 and 522).

Each of the state circuit courts had found it had jurisdiction to decide the issue of Tampa's right to condemn (A. 152-155, R. 485, 493, R. 517-519), although in no one of them had the issue been decided, although it was about to be decided in the Polk County action when all state court proceedings were stopped by the District Court's injunction.

Tampa's proposed track of approximately thirty miles was to be built from Port Sutton (see photograph, R. 391) to a point near the center of the phosphate producing territory where it would connect with no one (A. 98 and map, A. 144). For the phosphate producers or the South Pierce Railroad[2] to avail themselves of the transportation offered by Tampa they would have to build, own, and maintain at their expense their own connecting tracks (A. 98). There would be no through routes or joint rates, no connection with any other carrier and no interchange of traffic or equipment (A. 98). The phosphate rock and its products would be the only commodities handled which would move only from the phosphate mining territory to storage and dryers at Port Sutton (A. 5), a movement which was characterized by Tampa as more like that of a conveyor belt than a railroad (A. 98).

If the state courts had been permitted to proceed and had found that the proposed construction and operation would in fact and in law be in intrastate commerce and that Tampa had the power to condemn, and had proceeded with the assessment of damages by a jury,

---

[2]Examiner's report (A. 58): "Between Pierce and South Pierce, the railroads operate over the line of the South Pierce Railroad, a 9-10 mile long private line owned by American Agricultural Chemical Division of Continental Oil Company (American)." Also (R. 435-436).

Tampa would thereupon be free to proceed in intrastate commerce only with its proposed construction and operation notwithstanding the order of the Commission, subject only to review by the Florida appellate courts and to review by this Court on certiorari.

There could obviously be no physical construction or operation if Tampa was judicially denied the right to cross the existing railroads but the Court of Appeals found that (A. 12), "* * * an attempt to condemn lands for the purpose of constructing new trackage thereon without first acquiring a certificate from the Interstate Commerce Commission constitutes 'construction' within the meaning of this statute". The statute to which reference was made is 49 U.S.C.A. § 1(20) (§ 1(20)) which provides that any "construction" contrary to 49 U.S.C.A. § 1(18) (§ 1(18)) "may be enjoined by any court of competent jurisdiction."

The Court of Appeals found that the express authority of an Act of Congress for staying the normal course of the state court proceedings because they constituted "construction" in violation of § 1(18) was to be found in § 1(20), not because of the language of § 1(20) which obviously does not reach the situation, but because of "the nature of the interests protected by the statute" (A. 11, 14). Those interests were "paramount federal interests" (A. 15) which were not to be subjected even to the possibility of a decision by a state court adverse to the authority of the Commission.

That step produced a dilemma, however, as there was nothing in § 1(20), the statute found to contain the express authority for the Federal court to stop the state court, that required the Federal court itself to refrain from making its own inquiry into the jurisdic-

tion of the Commission, which is what the District Court here had announced it would do as soon as it could (R. 156-157). If § 1(20) authorized the one judge Federal District Court sitting as a court of general jurisdiction to make that inquiry it was perforce an inquiry triable in the state courts of general jurisdiction, and the injunction was in plain contravention of § 2283.

Upon the expressed views of the one judge Federal District Court that it would proceed to try that issue as a court of general jurisdiction, Tampa moved to dismiss the injunction, which motion was denied (R. 163) and this interlocutory appeal followed under the authority of 28 U.S.C.A. § 1292 (R. 164).

It was not until after oral argument that the Court of Appeals requested briefs from the Department of Justice and the Interstate Commerce Commission, which responded with a joint brief (A. 19, Note 6, 39-40, Note 14). The Government Brief (Gov. Brief) treated the state court actions as attacks upon the order of the Commission, making no distinction between Commission jurisdiction and Commission expertise.

The Government Brief admitted that there was authority that Commission findings of violations of 49 U.S.C.A. § 1(18) (§ 1(18)) could be challenged before a single Federal judge in an action under § 1(20) (Gov. Brief, p. 9) and that there was authority for the institution of a true § 1(20) suit in a state court (Gov. Brief, p. 17) but it suggested to the Court of Appeals that (Gov. Brief, p. 14), "A rule restricting attacks upon Commission 1(18) decisions to three-judge courts is undoubtedly the better view."

The Court of Appeals adopted the "better view" of the Government Brief, which avoided the dilemma. The Court of Appeals held that neither the one judge Federal District Court nor the state courts had jurisdiction, in the sense of power to adjudicate as an original matter, issues decided by the Commission, "including matters relating to its jurisdiction," (A. 25), characterizing the state court proceedings as being "in complete derogation of Federal law," (A. 17), and holding that such matters could be challenged only in the framework of the limited review available in the statutory three judge Federal District Court convened under the Urgent Deficiencies Act, 28 U.S.C.A. §§ 2321-2325 (§§ 2321-2325) (A. 25). Upon that reasoning § 1(20) was found by the Court of Appeals to be the express authority of an Act of Congress for the disregard of § 2283 under the circumstances of this case.

The construction put upon § 1(20) and §§ 2321-2325 is in conflict with the applicable decisions of this Court and calls for the exercise by this Court of its power of supervision. It also raises substantial Federal questions under the Fifth and Tenth Amendments to the Constitution of the United States in that (a) it violates due process by denying Tampa any "day in court", state or Federal, as the three judge court receives no evidence and sits only in review of administrative action, and (b) it deprives the state courts of their inherent power to determine their own jurisdiction in an eminent domain proceeding, a proceeding which is the essence of reserved state power.[3]

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

---

[3] The Federal courts may relinquish their jurisdiction to a Federal administrative agency, presumably without let or hindrance, as both the Fifth Circuit and the Fourth Circuit have done in the *Southern Railway* cases (A. 25-28) but for the Federal courts to relinquish to the Federal administrative agency a jurisdiction which is not theirs to surrender (i.e. that of the state courts) is another matter.

QUESTIONS PRESENTED

The fundamental question presented for review is:

1. Was the injunction issued by the one judge Federal District Court staying the eminent domain proceedings in the state courts expressly authorized by Act of Congress?

A negative answer to that question is the end of the matter and requires the vacation of the injunction. The affirmative answer given by the Court of Appeals, however, presents the further questions:

2. Is the construction of §1(20) to be the express authority of an Act of Congress to stay the eminent domain proceedings in the state courts, either (a) a decision of the Court of Appeals in conflict with the applicable decisions of this Court or (b) such a departure from the accepted and usual course of judicial proceedings as to call for the exercise by this Court of its power of supervision?

3. Does the construction of § 1(20) and §§ 2321-2324 as depriving Tampa of the right to have any judicial *trial* on the question of the jurisdiction of the Commission deny Tampa due process of law under the Fifth Amendment to the Contitution of the United States?

4. Does the construction of § 1(20) and §§ 2321-2325 as ousting the state courts of the power to determine their own jurisdiction in eminent domain proceedings invade the reserved powers of the states in violation of the Tenth Amendment to the Constitution of the United States?

An affirmative answer to any one of the latter questions requires the reversal of the judgment of the Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Constitution of the United States, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. 49 U.S.C.A. § 1(18):

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject

to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in Section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

4. 49 U.S.C.A. § 1(20):

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of

this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

5. 49 U.S.C.A. § 1(22):

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

6. 28 U.S.C.A. § 2283:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

7. 28 U.S.C.A. §§ 2321-2325:

(§ 2321) The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

(§ 2322) All actions specified in section 2321 of this title shall be brought by or against the United States.

(§2323) The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

(§ 2324) The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

(§ 2325) An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

8. F.S.A. 73.012, 73.021, 73.151:

(73.012) Actions in eminent domain shall be governed by the rules of civil procedure and the appellate rules unless otherwise provided by this chapter.

(73.021) Those having the right to exercise the power of eminent domain may file a petition therefor in the circuit court of the county wherein the property lies, which petition shall set forth:

(1) The authority under which and the use for which the property is to be acquired, and that the property is necessary for that use;

(2) A description identifying the property sought to be acquired. The petitioners may join in the same action all properties involved in a planned project whether in the same or different ownership, or whether or not the property is sought for the same use;

(3) The estate or interest in the property which the petitioner intends to acquire;

(4) The names, places of residence, legal disabilities, if any, and interests in the property of all owners, lessees, mortgagees, judgment creditors, and lienholders, so far as ascertainable by diligent search, and all unknown persons having an interest in the property when the petitioner has been unable to ascertain the identity of such persons by diligent

search and inquiry. If any interest in the property, or lien thereon, belongs to the unsettled estate of a decedent, the executor or administrator shall be made a defendant without joining the devisee or heir; if a trust estate, the trustee shall be made a defendant without joining the cestue que trust. The court may appoint an administrator ad litem to represent the estate of a deceased person whose estate is not being administered, and a guardian ad litem for all defendants who are infants or are under other legal disabilities; and for defendants whose names or addresses are unknown. A copy of the order of appointment shall be served on the guardian ad litem at least ten days before trial unless he has entered an appearance;

(5) A statement that the petitioner has surveyed and located its line or area of construction, and intends in good faith to construct the project on or over the described property;

(6) A demand for relief that the property be condemned and taken for the uses and purposes set forth in the petition, and that the interest sought be vested in the petitioner.

(73.151) (1) Whenever land sought to be condemned to the use of a railroad or canal company is in the possession, under any law of this state, of another railroad or canal company which is using the same in the construction or operation of its railroad or canal, the use of no more land than is necessary to furnish to the petitioner a right-of-way one hundred five feet in width across such railroad or canal shall be condemned for such use.

(2) If it shall be necessary for any railroad company organized under any law of this state to use, for the purpose of its road, any lands over which any other railroad company shall have previously acquired the right-of-way for its road, the right

to use such lands may be acquired as in other cases. Such lands shall not be taken in a manner to interfere with the main track of the railroad first established except for crossing, as provided by law.

9. F.S.A. 360.01:

(360.01) Every railroad and canal company shall be empowered:

(1) To cause such examinations and surveys for the proposed railroad or canal to be made as shall be necessary for the selection of the most advantageous route, and for such purposes by its officers, agents and servants to enter upon the lands or water of any person for that purpose.

(2) To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its road or canal, but the real estate received by voluntary grant shall be held and used for purposes of such grant only.

(3) To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its road or canal and the stations and other accommodations necessary to accomplish the objects of its incorporation, and to sell, lease or buy any lands or real estate not necessary for its use.

(4) To lay out its road or canal, not exceeding two hundred feet in width, and to construct the same, and, for the purpose of cuttings and embankments and for obtaining gravel and other material, to take as much land as may be necessary for the proper construction, operation and security of the road or canal, or to cut down any trees that may be in danger of falling on the road or into the canal, making compensation therefor as provided for land taken for the use of the company.

(5) To construct its road or canal across, along or upon or use any stream of water, water-course, street, highway or canal which the route of its road or canal shall intersect or touch, and whenever the track of any railroad or canal shall touch, intersect or cross any road, highway or street, it may be carried over or under such railroad or canal, as may be found most expedient for the public good; and in case any embankment or cut in the construction of any railroad or canal shall make it necessary to change the course of any highway or street, the company may construct such road or canal so as to change the course or direction of any road, highway or street.

(6) To cross, intersect or unite its railroad with any other railroad heretofore or hereafter to be constructed at any point in its route or upon the ground of any other railroad company with the necessary turnouts, sidings and switches and other conveniences in furtherance of the objects of its connections; and every company whose railroad is or shall be hereafter intersected by any new railroad can unite with the owners of such new railroads forming such intersections and connections and grant the facilities aforesaid, and if the two corporations cannot agree upon the amount of compensation to be made therefor and all the points and matters of such crossing and connections, the same shall be ascertained according to the provisions for exercising the right of eminent domain, and no company which shall have obtained the right of way and constructed its road at the point of intersection before the beginning of proceedings for condemnation shall be required to alter the grade or change the location of its road.

(7) To take and convey persons or property over their railroad or canal by the power or force of steam or animals or by any mechanical power, and to receive compensation therefor, and to do all the business incident to railroads or canal business.

(8) To erect and maintain all convenient buildings, wharves, docks, stations, fixtures and machinery for the accommodations and use of their passengers and freight business.

(9) To regulate the time and manner in which passengers and property shall be transported.

(10) To borrow such sums of money at such rates of interest and upon such terms as the company or its board of directors shall authorize or agree upon and may deem necessary or expedient, and to execute one or more trust deeds or mortgages, or both, as the occasion may require, of railroads or canals constructed or in process of construction by said company, for the amounts borrowed or owing by such company, as its board of directors shall deem expedient; and such company may make such provisions in such trust deed or mortgage for transferring their railroad track or canal right of way, depots, grounds, rights, privileges, franchises, immunities, machines, houses, rolling stock, furniture, tools, implements, appendages and appurtenances used in connection with such railroads or canals, in any manner whatsoever then belonging to the said company, or which shall thereafter belong to it, as security for any bonds, debts or sums of money as may be secured by such trust deed or mortgage, as they shall think proper; and in case of sale of any railroad or canal, or any part thereof, constructed or in course of construction by any railroad or canal company, by virtue or any trust deed or of any foreclosure of any mortgage thereon, the parties acquiring title under such, and their associates, successors or assigns, shall have or acquire thereby, and shall exercise and enjoy thereafter the same rights, privileges, grants, franchises, immunities and advantages in or by said trust deed or mortgage enumerated and conveyed, which belonged to and were enjoyed by the company making such deed or

mortgage or contracting such debt, so far as the same relate or appertain to that portion of said road or canal or the line thereof mentioned or described and conveyed by said mortgage or trust deed, and no further, as fully and absolutely in all respects as the corporators, officeholders, shareholders and agents of such company might or could have done, had not such sale or purchase taken place, and such purchasers, their associates, successors or assigns may become incorporated as provided by law.

10. F.S.A. 361.01:

(361.01) The president and directors of any corporation organized for the purpose of constructing, maintaining or operating public works, or their properly authorized agents, may enter upon any lands, public or private, necessary to the business contemplated in the charter, and may appropriate the same, or may take from any land most convenient to their work, any timber, stone, earth or other material which may be necessary for the construction and the keeping in repair of its works and improvements upon making due compensation according to law to private owners.

STATEMENT OF THE CASE

The pebble rock or bone valley area of Central Florida, the present center of which lies approximately 30 miles from the port of Tampa, and is the point to which Tampa proposes to build its track, produces approximately three-quarters of the entire phosphate rock production of the United States (R. 54), with over 17 million tons having been produced from that area in 1964 (R. 57), but the Florida phosphate industry, with over a billion dollars invested in land, plant and equipment in the bone valley[4] is extremely sensitive to foreign competition as approximately one-half of its entire production moves from the bone valley to the port of Tampa (A. 57) from where it is sold in the world markets in increasing competition from large phosphate deposits which have been discovered in Morocco, the Spanish Sahara, and in Russia, Peru and Australia (A. 68-69). In meeting that competition the cost of transportation to the port is vital.[5]

---

[4] Admittedly an estimate but see Fortune, June 1, 1968, p. 90 "All that Fertilizer and No Place to Grow," at p. 92:

> "In the past five years U.S. Companies have spent more than $4 billion, much of it borrowed from banks and insurance companies, to build fertilizer mines and plants. * * *

[5] Survey Review Report on Tampa Harbor, Florida, dated September 5, 1969, by the Department of the Army, Jacksonville District, Corps of Engineers, United States Army, pages C-23 and 24:

> "20. Transportation cost has always been an important factor in competition and in many instances the freight comprises a major portion of the total delivered cost. * * *
>
> 23. Competition for export markets is critical. Morocco, the world's largest phosphate exporter, with over 10 million tons a year, is planning to increase production to 18 million tons annually. Large deposits of high-grade phosphate rock in Peru and Australia have attracted much attention recently.

Two railroads were serving the Florida phosphate industry at the commencement of the condemnation proceedings in 1965, which were the Seaboard Air Line Railroad Company (Seaboard Air Line) and the Atlantic Coast Line Railroad Company (Atlantic Coast Line), whose merger into the present respondent Seaboard Coast Line Railroad Company became effective July 1, 1967 (R. 416). Seaboard Air Line, defendant in the Polk County action, made no effort at removal although there appeared to be both diversity and jurisdictional amount.

On or about March 18, 1965 the International Minerals and Chemical Corporation (IMC) opened its new phosphate drying, blending and storage facility on the north finger of Port Sutton (Photograph, R. 391) which at that time was served only by the Atlantic Coast Line. For the movement of phosphate rock to that facility the Atlantic Coast Line promulgated a rate for the rail line transportation only (the railroad having nothing to do with the subsequent drying, storage, or movement into vessel) from IMC origins in the bone valley of 75c a ton based upon an annual volume of not less than 2 million tons, *applicable to intrastate commerce only* (A. 104, R. 197. Item 1450 of Supplement 71-A to Florida Phosphate Rock Tariff 876 A).

(Footnote 5 continued)

Russia is a major producer with very large reserves, capable at any time of upsetting present market conditions. Morocco, Russia, and the Spanish Sahara all have significant freight advantages when shipping to European markets, where a major portion of Florida's exports are sold each year. Japan, Florida's largest customer, increased purchases from Morocco and Tunisia during the first 6 months of 1967 over the same period a year earlier. *The ability to export phosphate rock at the lowest possible cost becomes a major factor in determining if Florida will continue to be one of the primary sources of phosphate for the free world."* (Emphasis supplied)

That rail rate to Port Sutton remained in effect applicable to intrastate traffic only until November 1, 1965, when it was republished as applicable on both interstate and intrastate traffic. (R. 197 and 288).

There is now a difference in the rate for the identical movement to Port Sutton depending upon whether that traffic is classified as interstate or intrastate (See The IMC Proceedings, Post p. 29).

This rate to Sutton inaugurated on March 18, 1965, has a characteristic that is of vital importance in these proceedings. It is the only commodity rail rate for the movement of phosphate rock to the port of Tampa from the bone valley that was for the rail transportation and nothing else. The rates over the railroad owned facilities were what were known as "in-vessel" rates and uniformly included the putting of the phosphate rock into the hold of a vessel (A. 91). That in-vessel rate, at the commencement of these proceedings, was 115c a ton (A. 104). The Railroads consistently refused, in tariffs or otherwise to state separately the portion of the rate charged for the rail transportation and the portion charged for handling at the port and loading into vessel, and Commission upheld them in that refusal (A. 115).

The photograph to which reference has heretofore been made (R. 391) shows along its right hand edge the receiving and delivering tracks of the IMC facility at Sutton. All the railroad does under the rate to Sutton is to place loaded cars on those tracks and to take empty cars away from them. A plant locomotive handles the cars through the unloading sheds and puts them back for the pickup. A substantially identical facility to operate in the same manner would be constructed on the south finger of Port Sutton by The Phosphate Terminal Company (A. 47, an affiliate of Port Sutton, Inc.) and would be served by Tampa (A. 100), although Tampa would perform no service except the rail haul to Port Sutton where the cars would be taken over by The Phos-

phate Terminal Company, emptied, and returned to Tampa. At the time of the hearings, four years ago, Tampa expected to perform this rail service for 60c a ton (A. 103).

The railroad owned and operated facilities operate on an entirely different basis than the IMC Terminal or the proposed terminal of the Phosphate Terminal Company. The railroad facilities do not handle wet rock at all, and they provide no facilities for drying, blending or storage and serve no function independent of movement of the dry rock into the hold of a vessel. Such "blending" as is accomplished at the railroad facilities is done by the shifting of loaded cars, and the cars cannot be released until their contents have been dumped into the hold of a vessel (A. 62).

The IMC and the proposed Phosphate Terminal facility operate independently of the movement into the vessel, permit immediate release of the cars, and provide extensive facilities for drying, blending and storage of both wet rock and dry rock, functions with which neither Seaboard nor Tampa have anything to do.[6] IMC is the only producer that has a dryer at the port. All of the other dryers are situated at various locations in Hillsborough and Polk Counties, Florida, some distance from the port. (R. 387).

A few weeks after IMC had opened its new facility the Railroads announced that they were transferring their phosphate loading facilities from the port of Tampa to a point in Manatee County, called Piney Point, at which the Manatee County Port Authority proposed to

---

[6] Wet rock contains approximately 13% water and, as such, is not sold to customers (R. 393-394).

build a new and modern phosphate loading facility, and on June 14, 1965, the Railroads filed a joint application with the Commission for authority to construct a new line of railroad of approximately 44 miles from the phosphate producing territory to Port Manatee (A. 45), to by-pass the port of Tampa (A. 67-68, 111), and to handle the phosphate rock at the same in-vessel rate of 115c (A. 104). That application was given Finance Docket No. 23688.

The consequences of the removal of the phosphate movement from the port of Tampa to Port Manatee were considered serious in the extreme by the Tampa and Port Sutton interests. In terms of tonnage handled Tampa was the largest port in the southeast between Norfolk, Virginia, and Mobile, Alabama with the phosphate rock constituting the great bulk of the tonnage (A. 70). Among other things, the removal of the phosphate tonnage from the port of Tampa would probably have made impossible the deepening of the channels to 42 feet without which the port of Tampa could not survive as a major port, but which work has now been approved by the Corps of Engineers (Supra, Note 5).

In the sheer effort at preservation of Tampa as a port, and of the investment in and at Port Sutton, which already amounted to over $100 million dollars (A. 100), the Tampa Phosphate Railroad Company was organized, Port Sutton, Inc. acquiring all of its stock for which it paid $1 million dollars (A. 95), and following the Railroads' application by only two weeks, on July 1, 1965, Tampa filed its application with the Commission for authority to build its 30 mile track (A. 45) to permit

substantial quantities of phosphate from other producers to continue to move to the port of Tampa, and to provide the industry with a means of protecting its transportation costs. That application was given Finance Docket 23718.

The protection of industry transportation costs would come about not only by reduced charges paid to Tampa but by the existence of competition. Due to the captive nature of much of the rock (A. 64, 86) and the inaccessibility of certain of the shippers (A. 98) Tampa could physically handle only a limited tonnage of the rock moving to the port and none whatsoever of the movement to the interior which produced 75% of the Railroads' phosphate rock revenue so that Tampa's inroads in the Railroads' gross revenues would not be significant (A. 57). Nevertheless, the mere existence of the competition would be a protection to the industry and, for that matter, to the Railroads themselves which stand to suffer directly from the foreign competition.

Tampa contended before the Commission, in its application and otherwise, that it would not be a carrier subject to Part I of the Act, that it would not engage in interstate commerce and, in any event that its proposed track would be exempt from the construction jurisdiction of the Commission under §1(22) even if the movement over it was interstate commerce, and it prayed in its application and by subsequent formal motion filed November 1, 1965 (A. 51) that its application should be dismissed on those grounds. The formal motion for dismissal on jurisdictional grounds (A. 121) was not finally

denied until the Commission's order of August 7, 1967 (A. 147).[7]

The examiner found that the situation was fraught with great general public interest, including the legitimate interests of Port Sutton, and not merely that of the railroad public interest, saying (A. 123):

> "Nevertheless, it is quite clear that there is more at stake here than the mere construction of a given number of miles of track, and that these proceedings are of great moment not only to the carriers involved, but to the Port of Tampa and the legitimate aspirations of Port Sutton and the people of Manatee County, and to the phosphate industry of Florida as well."

but in passing upon the initial question as to the jurisdiction of the Commission in respect of Tampa's application (the Railroads being obviously subject to Part I of the Act) he put to one side any question of the general public interest, and limited his concern to the railroad public interest concept, saying that (A. 121):

> "* * * in each case such determination must be made on the basis of the facts presented in the light of the Congressional policy * * *"

---

[7] The examiner's comment that the motion was denied by the Commission on November 22, 1965, is not technically correct. The Commission's order said the issue could "best be resolved after hearing" (A. 51) which was simply a postponement of decision. If the Commission had at that time decided the question of its jurisdiction Tampa would probably have dismissed its application and proceeded then to mature the condemnation proceedings which would have made it crystal clear that Tampa was not attacking an order denying it a certificate for interstate operation.

The "congressional policy" to which the examiner had reference is, of course, the National Transportation Policy of the Act, which the concurring opinion of Chief Judge Brown sets out in full in footnote 11 (A. 36).

Having thus found the jurisdiction of the Commission over Tampa's application to be based upon the railroad public interest, the examiner likewise put aside any questions of general public interest in deciding the applications on the merits, saying (A. 124):

> "This is not to say, however, that the Commission should attempt to resolve the multifarious side-issues developed, or that these issues can be resolved within the narrow confines fixed by the scope of these proceedings. * * * This inquiry necessarily begins and ends with the question of public convenience and necessity solely as it relates to the proposed Piney Point and Tam-Phos lines."

and the examiner found that the industry sorely needed new facilities but that the railroad public interest did not justify the construction of the proposed line by either Tampa or the Seaboard.[8]

The Commission, by Division 3, had set for oral argument on February 8, 1967, the exceptions of both parties to the examiner's report (A. 147), and its subsequent action would indicate that it was concerned whether, if it granted the Port Manatee certificate to

---

[8] The examiner found (A. 125):

> "If there is one thing on which all of the parties to these proceedings appear to be in wholehearted agreement, it is that the existing port facilities are grossly inadequate to handle expeditiously the present volume of port rock and that this volume is steadily increasing. There is no question but that if the Florida producers are to maintain their competitive position in the world market this bottleneck must be eliminated."

Tampa's proposed track and the manner of its operation made it nothing more than an adjunct of a vitally needed new facility.

the Railroads, the resulting enormous reduction in service to Tampa did not require, even in the railroad public interest, the grant of a certificate to Tampa for its proposed operation. When the Supreme Court of Florida invalidated the Manatee $18.5 million bond issue (A. 87) in its decision in *State of Florida v. Manatee County,* 193 So.2d 162 (December 14, 1966, rehearing denied January 23, 1967), however, the Commission cancelled oral argument and *dismissed* the Seaboard application, but *denied* the Tampa application (A. 147-150). Tampa thereupon abandoned its effort to secure interstate authority and proceeded with the condemnation actions until stopped by the Federal court injunction.

Subdivisions I. II and III of the opinion of the Court of Appeals are dealt with hereafter under the "Reasons Relied Upon for the Allowance of the Writ," but Subdivision IV of the opinion dealing with the effect of "changed circumstances" may appropriately be mentioned here. Tampa did not intend to argue to the Court of Appeals either orally or on brief that there would be any physical changes in the construction or operation of its proposed trackage, with the single exception that it might determine to restrict its operation to the handling of wet rock only.[9]

---

[9] Tampa had devoted its utmost energies to satisfying the Commission that its facilities and operation were required as a matter of public necessity and convenience regardless of whether or not the Railroads' application in Finance Docket No. 23688 was granted, and its argument to the Court of Appeals was intended to be that the nature of the commerce was not merely a matter of law on the record made before the Commission but was a mixed question of fact and law and that there were additional relevant facts which it should be entitled to present to a court (*United States v. Idaho,* 298 U. S. 105, 80 L.Ed. 1070 (1936)).

Subdivision IV of the opinion indicates that, upon remand, but within a rather gray area, the Federal court, sitting as a one judge court in a § 1(20) action may pass upon the question of the nature of the commerce, provided there is (A. 33) "* * * new matter and new circumstances which justify treating Tampa's case as if there never had been an order of the Commission* * *" The opinion of the Court says that the burden of such a showing must be heavily upon Tampa (A. 33), and the concurring opinion says that the burden is impossible. (A 34-35).

Tampa agrees that the burden is impossible for even if Tampa restricts its operation to wet rock only the fact remains that the examiner's report considered and specifically held that the movement of wet rock was interstate (A. 117-117) which the Commission adopted (A. 147). But the burden is "impossible" for another reason.

The concession made by Subdivision IV of the opinion runs headlong into the dilemma mentioned above (Supra, p. 5 and 6). To whatever extent the one judge Federal district court might have jurisdiction notwithstanding the order of the Commission, the state court must have a like jurisdiction, so that upon the concession made by Subdivision IV § 1(20) would cease to be the express authority of an Act of Congress, and the injunction would become contrary to § 2283. Consequently, the burden is impossible if the injunction is to stand, and, as the concurring opinion observed (A. 40), "The return to the Trial Court will be a water haul for Tampa."

THE IMC PROCEEDINGS

The IMC was the only shipper that produced a witness to testify voluntarily before the Commission, where the two applications had been consolidated over Tampa's objections (A.48), in favor of Tampa's application but numerous shippers testified in support of the Railroads' application,[10] and the testimony offered for Tampa was that the operation of the facility on the south finger of Port Sutton would be substantially identical with the IMC operation (A. 100-101).

Due to the relevance of the IMC operation Tampa has called to the attention of the Court, by inclusion at the end of the Appendix (A. 171-194) certain recent developments involving the IMC operation at Port Sutton, and the railroad movement to Port Sutton, which have a bearing upon this case and upon the matters discussed in the opinion of the Court of Appeals.

On July 11, 1969, Seaboard petitioned the Commission for a declaratory order under Section 5(d) of the Administrative Procedure Act (5 U.S.C.A. 554(e)). The petition pointed out that the movement of the phosphate rock to IMC at Sutton, due to the *ex parte* increases on interstate traffic with no corresponding increases by the Florida Public Service Commission in the intrastate rate, was subject to one rate, the higher, if it was an interstate movement, and to a different and lower rate if it was an intrastate movement (A. 173).

---

[10] The examiner noted the dependency of the shippers upon the Railroads for their supply of cars, even to keep their plants in operation (A. 84), and discounted their support of the Railroads' application (A. 125-126).

The petition for a declaratory order stated that Seaboard had been applying the higher interstate rate, that IMC contended the lower intrastate rate was applicable and had filed a claim for overcharges of approximately $800,000.00 (A. 173). It referred to the Commission's determination in the Piney Point and Tampa proceedings (Finance Dockets Nos. 23688 and 23718) that Tampa's proposed movement of phosphate rock to Port Sutton was interstate in character, and asked for a declaratory order that the actual IMC movement to Sutton was interstate in character and that the interstate rate should be applied (A. 175).

On August 5, 1969, IMC filed suit in the Circuit Court of Polk County alleging that the intrastate rate was applicable and praying judgment for overcharges aggregating $791,893.55, for the period from August 19, 1967, to May 9, 1969 (A. 175).

On August 18, 1969, Seaboard moved to dismiss that complaint in the state court on the grounds, among others, that it affirmatively appeared that the State Court lacked jurisdiction of the subject matter in that the exclusive or primary jurisdiction was in the Interstate Commerce Commission or the Florida Public Service Commission (A. 192-193).

On November 5, 1969, the Commission entered the following order (A. 194):

> "*And it is further ordered,* that, in the exercise of our discretion in this matter, in which the issue is now before the Court, the petition be, and it is hereby, denied."

In the order of the Florida Public Service Commission of May 14, 1969, that Commission also expressed the view that it should not consider a change in the rate

to Sutton (A. 182), "* * *until the parties have obtained some judicial determination concerning the nature of the transportation in question."

It is to be doubted if the state commission had in mind a three judge Federal district court. Compare the discussion in the opinion of the Court of Appeals as to "which court was to pass upon the question" (A. 22-23). In that discussion, however, the Court of Appeals was considering "which" court should review "the Commission's power to deny a certificate" but that was not the question. The review of the Commission's decision as to convenience and necessity is admittedly to be before a three judge Federal district court. The actual question before the Court of Appeals was not which court had had the power to review the question of convenience and necessity, but was which court, or courts, had power to adjudicate the character of the commerce.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

POINT I

THE OPINION OF THE COURT OF APPEALS CHANGED THE CHARACTER OF THE INJUNCTION AND TERMINATED THE LITIGATION.

The Court of Appeals referred to the rule that ordinarily the decree of a District Court granting or denying a preliminary injunction would not be disturbed on appeal, and found that Seaboard's complaint had raised serious questions that were "* * *a fair ground for litigation and thus for more deliberate investigation" (A.

9). That rule would, of course, militate against or preclude the grant of certiorari but it is not applicable here because the opinion and judgment of the Court of Appeals ousts the state courts of jurisdiction with finality and leaves no ground for more deliberate investigation.[11] In *Myers, post,* after noting that ordinarily the decree of a district court granting or denying a preliminary injunction would not be disturbed on appeal, this Court said (82 L.Ed. at p. 645):

> "But that rule of practice has no application where, as here, there was an insuperable objection to the maintenance of the suit in point of jurisdiction and where it clearly appears that the decree was the result of an improvident exercise of judicial discretion."

The "insuperable" objection to the maintenance of this suit, in which the only relief prayed was the restraint of the state courts, was § 2283, and even if § 1(20) could be construed as the express authority of an Act of Congress permitting the injunction, the existence of a concurrent jurisdiction in the state courts made the injunction, in the absence of any showing of irreparable injury, the improvident exercise of judicial discretion, and, going further, if §§ 2321-2325, have in fact ousted the state courts of jurisdiction then the opinion of the Court of Appeals changed the injunction from interlocutory to a final disposition of the actions. And in the case of *American Construction Co. v. Jacksonville T. & K.*

---

[11] The Court of Appeals cited the cases of *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738 (CA 2nd, 1953), *Railroad Yardmasters v. Pennsylvania Railroad Co.*, 224 F. 2d 226 (CA 3rd, 1955) and *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 58 Ct. 459, 82 L.Ed. 638 (1938). The first two are irrelevant because on the question of the power to stay the state court proceedings the Court of Appeals leaves no question open for more deliberate investigation and the *Myers* case is authority for the exercise by this Court of its power of supervision.

W.R. Co. 148 U. S. 372, 13 S. C. 758, 37 L.Ed. 486 (1893), this Court pointed out that at what stage of the proceedings and under what circumstances the case should be required by certiorari or otherwise to be sent up for review was left to the discretion of this Court as the exigencies of each case may require.

In the instant case, the reason for the rule against interlocutory review has ceased to exist. Under the decision of the Court of Appeals, notwithstanding the guarded qualification of Subdivision IV of the opinion, this particular case is at an end, and there can be no further proceedings. If the restraint of the state courts by the District Court was in error, and if the reason for its affirmance by the Court of Appeals was in error, the remedy should be afforded now, and not wait a meaningless return to the trial court for the perfunctory entering of a permanent injunction against the state court proceedings and a subsequent appeal from that order. Nor is the finality of the decision of the Court of Appeals lessened by the possibility that the District Court may adopt the suggestion of the concurring opinion (A. 39. Note 13) and send the matter back to the Commission.

The validity or invalidity of the restraint of the state courts in the face of § 2283 is not dependent on how the Commission may rule on a re-examination of the questions. The decision of the Court of Appeals has forever ousted the state courts of their original jurisdiction for even if the Commission on re-examination should find the commerce to be intrastate, the Seaboard could not ask the state courts to hold otherwise for on the rationale of the Court of Appeals, the Commission's negative finding as to its jurisdiction could be reviewed only in a three judge Federal district court.

The opinion and judgment of the Court of Appeals changed the character of the injunction and terminated the litigation. The remand to the District Court became illusory, and the resulting situation calls for the exercise at this time of this Court's power of supervision.

POINT II

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

On its face § 1(20) gives to any court of competent jurisdiction the power to enjoin a violation of § 1(18). The statute does not state or even suggest that power to determine whether or not § 1(18) is being violated is taken away from the state courts. In the face of the plain language of the statute the decision of the Court of Appeals is in conflict with *Dowd Box Co. v. Courtney,* 368 U. S. 502, 82 S. Ct., 519, 7 L.Ed. 2d 483 (1962) and *Chaflin v. Houseman,* 93 U. S. 130, 23 L.Ed 833 (1876).

In *Dowd Box Co., supra,* the sole question presented was whether Section 301(a) of the Labor Management Relations Act of 1947 operated to divest a state court of jurisdiction over a suit for violation of a contract between an employer and a labor organization.[12] The Supreme Court agreed with the Supreme Judicial Court of Massachusetts (169 NE 2d 885) that the statute did not operate to deprive the state courts of jurisdiction.

---

[12] 301(a) (29 U.S.C.A. § 185(a)) reads as follows:

"Suits for violaiton of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The Supreme Court cited with approval the case of *Chaflin v. Houseman,* supra, as expressing the law today even though decided eighty-six years ago, and held that the rationale of Lincoln Mills[13] would not be frustrated if state courts were allowed to exercise concurrent jurisdiction over suits within the purview of Section 301(a).

On the concurrent jurisdiction of the state courts to enforce rights created by Federal law, this Court said (7 L.Ed. 2d, at p. 487,488):

> "We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule. * * *
>
> "To hold that § 301(a) operates to deprive the state courts of a substantial segment of their established jurisdiction over contract actions would thus be to disregard this consistent history of hospitable acceptance of concurrent jurisdiction."

The power of the Florida courts to decide whether a proposed railroad construction is in violation of § 1(18) or comes within the exception of § 1(22) is part of their established jurisdiction (*Seaboard Air Line Ry. Co. v. Tampa Southern R. Co.,* 121 So. 877 (Sup Ct. Fla. 1929)) and was so recognized by the Fifth Circuit in *Georgia Southern & Florida Ry. Co. v. Duval Connecting R. Co.,* 324 F.2d 801 (CA 5th 1963). The opinion of the Court of Appeals does not concede the existence

---

[13] *Textile Workers Union v. Lincoln Mills,* 353 U. S. 448, 1 L.Ed. 2d 972 (1957).

here of a concurrent jurisdiction in that respect in the state and Federal courts,[14] and does not discuss it in that context, simply saying that (A. 16), "The case before us involves neither the same cause of action in both state and federal courts, nor a common *res* over which the district court had to assume jurisdiction.' In refusing to recognize and give effect to the concurrent jurisdiction of the state and Federal courts the Court of Appeals disregarded its own teachings[15] as well as the decisions of this Court.

POINT III

THE DECISION OF THE COURT OF APPEALS DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE BY THIS COURT OF ITS POWER OF SUPERVISION

The present §§ 2321-2325 had their origin in the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208) which abolished the Commerce Court and transferred its jurisdiction to the several District Courts of the United States (38 Stat. 219-221). That act, and the procedure it prescribed had been in effect for nearly seven years at the time of the enactment of the Transportation Act of 1920 on February 28, 1920 (41 Stat. 456) which enacted the present §§ 1(18), 1(20) and 1 (22) (41 Stat. 477-478.)

---

[14] The only discussion of concurrent jurisdiction was an inquiry whether it existed as between the one judge Federal district court and the three judge Federal district court, which were found to be mutually exclusive (A. 22-23).

[15] In *T. Smith & Son, Inc. v. Williams*, 275 F.2d 397 (CA 5th, 1960), which received only a "cf." reference in this opinion (A. 11).

The Congress, in enacting § 1(20) obviously did so in the light of the Urgent Deficiencies Act. It does not seem reasonable to believe that by the use of the words "any court" in § 1(20) Congress intended not only something different than the plain meaning of the words, but also that it actually intended in 1920 by the qualifying words "of competent jurisdiction," to oust the state courts of their judicial power by depriving them of their status as courts of competent jurisdiction.

Research by counsel for Tampa has not disclosed another case in which § 1(20) and §§ 2321-2325 have been bracketed in this manner to produce such a result and it is respectfully submitted that the resulting construction put upon § 1(20) nearly fifty years after its enactment falls within the ban so forcefully expressed in *Romero v. International Term. Operat. Co.*, 358 U. S. 354, 79 S. Ct. 468, 3 L.Ed 2d 368 (1959) and calls for the exercise by this Court of its power of supervision.

POINT IV

§ 1(20) AND §§ 2321-2325 AS NOW CONSTRUED, BY DENYING TO TAMPA ANY JUDICIAL DETERMINATION OF THE JURISDICITION OF THE COMMISSION DENY TAMPA DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

This point may, perhaps, be also stated by pointing out that the Court of Appeals denied Tampa constitutional due process by holding that the matter of the Commission's jurisdiction was committed to its own expertise and could be challenged only in a three judge court (A. 25), in the face of settled construction to the contrary (*Texas & Pacific*, post, note 16).

At the time of Tampa's application to the Commission and, in fact, up until the instant decision of the Court of Appeals the law had been settled for over forty years than an unsuccessful applicant for a certificate, by making application to the Commission, coupled with a suggestion to the jurisdiction, did not waive any right later to defend a § 1(20) action on the ground of lack of jurisdiction in the Commission[16] and to have the issue tried *de novo*[17].

The discussion in the opinion of the Court of Appeals of the repudiation of the negative order doctrine by *Rochester*[18] does not appear to be relevant. *Rochester* simply holds that Tampa could, if it so desired, have had a *review* of the Commission decision *denying it a certificate* before a three judge Federal district court, but it does not hold either that Tampa is compelled to convene a three judge Federal district court, or that the repudiation of the negative order doctrine in any way impaired, the jurisdiction of any court of competent jurisdiction, state or Federal, previously existing.[19]

The contention presented under this point is different from that presented under Point V in that while the Federal district court, if composed of three judges,

---

[16] *Texas & Pacific R. Co. v. Gulf C. & S.F.R.Co.* 270 U. S. 266, 70 L.Ed. 578 (1926) and *Piedmont & Northern Co. v. Unted States,* 280 U. S. 469, 74 L.Ed. 551 (1930)

[17] *United States v. Idaho,* 298 U. S. 105, 80 L.Ed. 1070 (1936)

[18] *Rochester Telephone Corp. v. United States,* 307 U. S. 125, 59 S. Ct. 754, 83 L.Ed. 1147 (1939)

[19] *Rochester Telephone Corp. v. United States,* 307 U. S. 125, 83 L.Ed. 1147 (1939), "The nature of the issues foreclosed by the Commission's action and *the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same.*" (307 U. S. at p. 142) (Emphasis supplied)

has power to *review* Commission action it has no power to *adjudicate* in respect of a matter not heretofore committed by law to the expertise of the Commission.

This present construction of § 1(20) and §§ 2321-2325 by the Court of Appeals denies Tampa due process of law (*Gelpecke v. City of Dubuque*), 1 Wall 175, 17 L. Ed. 520 (1864), *Dawson v. Kentucky Distilleries & Warehouse Co.* 255 U. S. 288, 41 S. C. 638, 65 L.Ed. 638 (1921), and *Montana Nat. Bank v. Yellowstone County,* 276 U. S. 499, 48 S. Ct. 331, 72 L.Ed. 673 (1928)).

POINT V

THE CONSTRUCTION OF § 1(20) AND §§ 2321-2325 AS OUSTING THE STATE COURTS OF THEIR OWN JURISDICTION IN EMINENT DOMAIN PROCEEDINGS INVADES THE RESERVED POWERS OF THE STATES IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

This point is directed to the effect upon the state courts, rather than the effect upon Tampa. In *Douglas v. Jeanette,* 319 U. S. 157, 63 S. Ct. 877, 87 L.Ed. 1324, at 87 L.Ed. 1324, this Court said:

> "The power reserved to the states under the constitution to provide for the determination of controversies in their courts may be restricted by Federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution."

And in *Healy v. Ratta,* 292 U. S. 263, 54 St. Ct. 700, 78 L.Ed. 1248, at 78 L.Ed. p. 1254, this Court said:

"Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."

This present construction of § 1(20) and §§ 2321-2325 makes those statutes Congressional legislation that is not in conformity with the Judiciary Article of the Constitution.

POINT VI

THE OPINION OF THE COURT OF APPEALS PRESENTS SERIOUS QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The questions raised by the opinion of the Court of Appeals are of public interest and moment in the administration of the Act and in the interrelationship of Federal and state authority.

On April 24, 1969, the Commission submitted to the Congress proposed legislation that would repeal §§ 2321-2325 of the Judicial Code and transfer to the United States Courts of Appeal exclusive jurisdiction to review orders of the Commission. It would limit review to the record made before the Commission and would require that a petition for review be filed within 60 days. It does ont mention § 1(20) but would provide in its § 2 that, "Chapter 157 of Title 28, United States Code *and any other provision of law inconsistent* with this Act are hereby repealed." (Emphasis supplied (Commission release No. 112-69, April 24, 1969).

This Court noted *I.C.C. v. Atlantic Coast Line R. Co.*, 383 U. S. 576, 86 S. Ct. 1000, 16 L.Ed. 2d 109 (1966), that Congressional attention to the entire subject matter of review of Commission orders was long overdue and the questions presented by this opinion of the Court of Appeals are relevant and material to that subject matter and have not been, but should be, settled by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Dated at Tampa, Florida,
Nov. 22, 1969

s/ JAMES B. MCDONOUGH, JR.

JAMES B. MCDONOUGH, JR.
DAVID C. G. KERR
of MACFARLANE, FERGUSON, ALLISON AND KELLY
Attorneys for Petitioner,
Tampa Phosphate Railroad Company
512 Florida Avenue, P.O. Box 1531
Tampa, Florida

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 22nd day of November, 1969, one copy of the foregoing Petition for Writ of Certiorari was furnished by delivery to William A. Gillen, Esq., and one copy also by delivery to James E. Thompson, Esq., both of Messrs. Fowler, White Collins, Gillen, Humkey and Trenam, First Federal Building, Tampa, Florida, attorneys for respondent Seaboard Coast Line Railroad Company, and that one copy of the same was furnished by air mail with postage prepaid to the Solicitor General, Department of Justice, Washington, D. C., and in like manner one copy was furnished to John H. D. Wigger, Esq., Department of Justice, Washington, D. C., and in like manner one copy each to Robert W. Ginnane, Esq., and Jerome Nelson, Esq., Counsel for the Interstate Commerce Commission, Washington, D. C., and that copy has also been furnished by air mail with postage prepaid to the Clerk of the United States Court of Appeals for the Fifth Circuit, 400 Royal Street, New Orleans, Louisiana.

s/JAMES B. MCDONOUGH, JR.

Counsel for Petitioner

SUPREME COURT, U. S.

NOV 24 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 877

TAMPA PHOSPHATE RAILROAD COMPANY,

Petitioner,

vs.

SEABOARD COAST LINE RAILROAD COMPANY,

Respondent.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

Including

ORDER ON REHEARING

OPINION OF COURT OF APPEALS

REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION DENYING CERTIFICATE

ORDER OF CIRCUIT COURT OF POLK COUNTY, FLORIDA

PRELIMINARY INJUNCTION GRANTED BY UNITED STATES DISTRICT COURT ENJOINING PROCEEDINGS IN THE STATE COURTS

AFFIDAVIT OF JURISDICTIONAL AMOUNT IN POLK COUNTY ACTION

ORDER OF INTERSTATE COMMERCE COMMISSION DENYING REQUEST FOR DECLARATORY ORDER IN RELATED MATTER

AND OTHER RELATED MATTERS

JAMES B. MCDONOUGH, JR.
DAVID C. G. KERR
of MACFARLANE, FERGUSON, ALLISON AND KELLY
Attorneys for Petitioner,
Tampa Phosphate Railroad Company
512 Florida Avenue, P.O. Box 1531
Tampa, Florida

FREE PRESS PUB. CO., INC. - TAMPA, FLORIDA

TABLE OF CONTENTS

Document	Date	Page
Order of Court of Appeals denying Petition for Rehearing	October 24, 1969	1-2
Opinion of Court of Appeals	October 1, 1969	3-40
Report and Order recommended by hearing examiner of the Interstate Commerce Commission and Exhibits thereto	September 9, 1966	41-146
Decision and Order of the Interstate Commerce Commission	August 7, 1967	147-150
Order of Circuit Court of Polk County, Florida, setting case for trial on December 8, 1967 on issue of Tampa's right to condemn	October 6, 1967	152-155
Order Granting Preliminary Injunction of United States District Court staying proceedings in state courts	December 14, 1967	156-162
Order Denying Motion to Dissolve and Vacate Preliminary Injunction	April 22, 1968	163
Notice of Appeal from order of April 22, 1968	May 17, 1968	164
Affidavit of jurisdictional amount in Polk County action	October 26, 1968	165-170

TABLE OF CONTENTS (Cont'd)

Document	Date	Page
Petition of Seaboard Air Line Railroad Company to Interstate Commerce Commission for Declaratory Order as to character of its phosphate rock movement to Sutton, and Exhibits thereto	July 17, 1969	171-185
Notice published in Federal Register	August 4, 1969	186
Complaint in Circuit Court of Polk County, Florida, by International Minerals and Chemical Corporation to recover overcharges on transportation of phosphate rock to Sutton, Florida	August 5, 1969	187-191
Motions of Defendant Seaboard Coast Line Railroad Company directed to the overcharge complaint	August 18, 1969	192-193
Order of Interstate Commerce Commission denying petition for declaratory order	November 5, 1969	194

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26424

TAMPA PHOSPHATE RAILROAD COMPANY,
Appellant,

versus

SEABOARD COAST LINE RAILROAD COMPANY,
Appellee.

Appeal from the United States District Court for the Middle District of Florida.

(October 24, 1969)

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, and GEWIN and GOLDBERG, Circuit Judges.

PER CURIAM: The following sentence found on page 3, the seventh line in the first full paragraph, of the slip opinion is hereby deleted:

> In its application Tampa declared that the proposed railroad was intended primarily to transport phosphate rock and all products

thereof from Port Sutton in Hillsborough County, Florida, to a point some thirty miles away in Polk County, Florida.

In lieu thereof the following is substituted:

In its application Tampa declared that the proposed railroad was intended primarily to transport phosphate rock and all products thereof to Port Sutton in Hillsborough County, Florida, from a point some thirty miles away in Polk County, Florida.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

CORRECTED

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26424

TAMPA PHOSPHATE RAILROAD COMPANY,
Appellant,

versus

SEABOARD COAST LINE RAILROAD COMPANY,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

(October 1, 1969)

Before BROWN, Chief Judge, and GEWIN and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge: This case involves the right of a company to condemn lands in furtherance of its railroading ambitions after it has been denied a certificate of public convenience and necessity by the Interstate Commerce Commission. We must decide whether a federal district court has the power under

49 U.S.C.A. § 1(20)[1] to issue an injunction against condemnation proceedings in state courts that are said to violate § 1(18) of the Interstate Commerce Act.[2]

---

[1] 49 U.S.C.A. § 1(20)

> The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

[2] 49 U.S.C.A. § 1(18)

> No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroads, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the

We also find it necessary to consider what defenses, if any, may be asserted in opposition to the alleged violation.

The history of this case begins in July of 1965 when Tampa Phosphate Railroad Company (Tampa), a corporation not yet operating as a railroad, filed an application with the Interstate Commerce Commission (Commission) questing for authority to construct a railroad under Section 1(18)-1(22) of the Interstate Commerce Act. See 49 U.S.C.A. § 1(18)-1(22). ~~In its~~ In its application Tampa declared that the proposed railroad was intended primarily to transport phosphate rock and all products thereof to Port Sutton in Hillsborough County, Florida, from a point some thirty miles away in Polk County, Florida.

~~away in Polk County, Florida~~. Tampa prayed for the grant of a certificate authorizing construction of this railroad, and in the alternative for dismissal of its application as beyond the Commission's jurisdiction. Tampa contended in support of this alternative that (a) its proposed railroad would operate only in *intra-*

---

construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this Chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

state commerce, and (b) that the line would constitute a spur or industrial track within the exemption of 49 U.S.C.A. § 1(22).[3]

After hearings, the Interstate Commerce Commission examiner recommended denial of the application. He held that the Commission did have jurisdiction because the proposed railroad would operate in *interstate* commerce, and he found that the new trackage would not constitute a spur or industrial track within the meaning of § 1(22). He then denied Tampa's application, ruling that construction and operation had not been shown to be required by the present and future public convenience and necessity.

Subsequent to the completion of the administrative hearing, the Interstate Commerce Commission found in a decision dated August 7, 1967, that "the findings and conclusions of the hearing examiner on matters of fact and law considered and disposed of in his report and recommended order are in all material respects proper and correct." The order of the examiner denying Tampa's application was thereupon affirmed and adopted by the Commission. No appeal was taken from this order.

---

[3] 49 U.S.C.A. § 1(22)

> The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Following the denial of its application, Tampa directed its full energies toward a series of condemnation suits then in progress in the state courts of Florida. The first and second of these suits had begun on October 13, 1965, in the Circuit Court of Hillsborough County, Florida, while Tampa's application was still pending before the Commission. The third suit began a short time later in the Circuit Court of Polk County, Florida. In all proceedings Tampa sought easements or rights-of-way for its proposed railroad across existing trackage of the Seaboard Coast Line Railroad Company (Seaboard). As authority for these easements, Tampa relied upon certain Florida eminent domain statutes permitting one railroad to cross the tracks of another railroad. See F.S.A. §§ 73.012, 73.021, 73.151, 360.101, 361.01. Seaboard opposed Tampa's petition in each state court and sought dismissal of the actions on the grounds, *inter alia*, that the proposed construction would be in interstate commerce and that the Commission had denied Tampa the requisite certificate. The Circuit Court of Polk County, apparently reserving its ruling on Seaboard's motion to dismiss, scheduled the matter for trial on December 18, 1967.

Meanwhile, Seaboard had initiated this suit in the United States District Court for the Middle District of Florida. Seaboard there sought an injunction to prevent Tampa from continuing condemnation proceedings against Seaboard's property, and further sought to enjoin Tampa from constructing or operating any railroad facilities without first procuring a certificate from the Commission. Tampa's actions were alleged to be in violation of § 1(18) of the Interstate Commerce

Act, 49 U.S.C.A. § 1(18), and an injunction was sought under § 1(20) of the Act, 49 U.S.C.A. § 1(20), to prevent further violations.

Tampa responded to Seaboard's complaint with an answer and with a motion to dismiss. Argument on the motion to dismiss was held on December 12, 1967, and on December 14, 1967, the district court denied Tampa's motion to dismiss and granted a preliminary injunction against any condemnation of Seaboard's property or construction thereon until a certificate of convenience and necessity was procured from the Commission. In its findings of fact and conclusions of law, the court found that it had jurisdiction under 28 U.S.C.A. § 89(b), 28 U.S.C.A. § 1337, and 49 U.S.C.A. § 1(18)-1(20). It also found that Seaboard was a proper party in interest within the meaning of 49 U.S.C.A. § 1(20). The court overruled Seaboard's motion for judgment on the pleadings, holding that the order of the Interstate Commerce Commission was not res judicata on the intrastate or interstate character of the proposed railroad. It then reserved this issue of interstate commerce for independent investigation at a later date. The court also determined that the provisions of 28 U.S.C.A. § 2283 "are not applicable or controlling in this case."

Further argument was heard on the case on March 6, 1968, and on April 22, 1968, the court overruled Tampa's motion to dissolve and vacate the preliminary injunction. Again the court reserved ruling on the interstate or intrastate character of the proposed railroad.

Tampa appeals to this court from the denial of its motion to vacate. 28 U.S.C.A. § 1292(a) (1).

We hold that the district court was within its authority in refusing to dissolve the preliminary injunction. We base our decision largely on the view that neither 28 U.S.C.A. § 2283 nor principles of comity present any bar to the issuance of the district court's injunction. We also find on the record before us that Seaboard "has ... raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Hamilton Watch Co. v. Benrus Watch Co.*, 2 Cir. 1953, 206 F.2d 738, 742; *Railroad Yardmasters v. Pennsylvania Railroad Co.*, 3 Cir. 1955, 224 F.2d 226, 229. No more definitive examination of the merits is required on appeal from a refusal to vacate a preliminary injunction. See *Railroad Yardmasters v. Pennsylvania Railroad Co., supra.* "... Ordinarily the decree of a District Court granting or denying a preliminary injunction will not be disturbed on appeal." *Myers v. Bethlehem Shipbuilding Corp.*, 1938, 303 U.S. 41, 52, 58 S.Ct. 459, 82 L.Ed. 638. No extraordinary reasons for departure from such rule are here presented.

I.

We deal first with Tampa's contention that the anti-injunction statute, 28 U.S.C.A. § 2283, bars injunctive process against the further prosecution of condemnation suits in the state courts of Florida. The statute provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

We note at the outset that § 2283 applies irrespective of whether the federal injunction is directed to the parties or to the state courts. *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 1940, 309 U.S. 4, 9, 60 S.Ct. 215, 84 L.Ed. 537. The statute also applies when, as here, the state proceedings are already in progress. *Hill v. Martin*, 1935, 296 U.S. 393, 403, 56 S.Ct. 278, 80 L.Ed. 293. Under these circumstances the injunction is contrary to the statute unless it falls within one of the exceptions authorized by the statute itself.

The district court found § 2283 inapplicable to the instant case apparently because the injunction could issue "in aid of its jurisdiction."[4] Argument before the trial court indicates that this exception was invoked on the premise that an injunction against state proceedings is proper when the federal courts have exclusive jurisdiction over the subject matter of the action. *Bowles v. Willingham*, 1944, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892; *Capital Service v. N.L.R.B.*, 1954, 347

---

[4]THE COURT:

> "Now, perhaps that is what I was referring to primarily when I said '2283 is not applicable'; because, in a sense, there is no question about the fact that the Court did enjoin a State proceeding; and the Court did it in aid of its own jurisdiction." (R. 292)

U.S. 501, 74 S.Ct. 699, 98 L.Ed. 887. Without assaying the merit of this rationale as applied to the instant case, cf. *T. Smith & Son, Inc. v. Williams*, 5 Cir. 1960, 275 F.2d 397, we hold that the preliminary injunction could issue under the "expressly authorized" exception to § 2283.

Section 2283 permits the issuance of a federal injunction against state court proceedings when "expressly authorized by Act of Congress." It is well established that an injunctive provision "need not expressly refer to § 2283" in order to come within this exception. *Amalgamated Clothing Workers v. Richman Brothers Co.*, 1955, 348 U.S. 511, 516, 75 S.Ct. 452, 99 L.Ed. 600. It is also clear that the language of the authorizing statute need not "refer to the subject matter of federal stays of state court proceedings." *Dilworth v. Riner*, 5 Cir. 1965, 343 F.2d 226, 230. On the other hand, a case does not fall within the exception merely because it involves a statute that permits injunctive relief in general terms. See *Baines v. City of Danville*, 4 Cir. 1964, 337 F.2d 579, *cert. denied*, 381 U.S. 939; *Sexton v. Barry*, 6 Cir. 1956, 233 F.2d 220, *cert. denied*, 350 U.S. 838; *Smith v. Village of Lansing*, 7 Cir. 1957, 241 F.2d 856; *Cameron v. Johnson*, S.D. Miss., 1966, 262 F.Supp. 873, 878, *aff'd*, 390 U.S. 611; *Greene v. State of New York*, S.D. N.Y. 1967, 281 F. Supp. 579, 581. Beyond these general guidelines the rules are less clear. Courts must then consider the nature of the interests protected by the statute authorizing the injunction, *Father Nathaniel Machesky, et al., v. W. H. Bizzell*, 5 Cir. 1969, ____ F.2d ____ (No. 26832, June 5, 1969); *Studebaker Corporation v. Gittlin*,

2 Cir. 1966, 360 F.2d 692, and the parties authorized to bring suit. See *Leiter Minerals, Inc. v. United States*, 1957, 352 U.S. 220, 225-226, 77 S.Ct. 287, 291, 1 L.Ed. 267.

In the circumstances of this case we look to Section 1(20) of the Interstate Commerce Act, 49 U.S.C.A. § 1(20) for injunctive authority. That statute reads:

> "* * * Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest. * * *"

There appears to be no serious question that an attempt to condemn lands for the purpose of constructing new trackage thereon without first acquiring a certificate from the Interstate Commerce Commission constitutes "construction" within the meaning of this statute. See *Gilmore v. Sandersville Railroad Company*, M.D. Ga. 1955, 149 F.Supp. 725. *Cf. Bingham v. Taylor*, 5 Cir. 1926, 12 F.2d 15. Any uncertainty in this regard should be resolved in favor of coverage in view of the national interests to be protected. See this opinion, p. 12 *infra*. The undecided question is whether these same interests, and their function in the overall regulatory scheme, justify treating § 1(20) as an express exception to Section 2283.

We begin by noting that Section 1(20) authorizes suit by both public and private parties, a strong indication that the Act contemplates supplementing governmental regulation with private action. One court in confronting a similar statutory scheme in § 322(b) (2) of the Interstate Commerce Act has compared such supplemental private actions to private suits under § 15 of the Clayton Act. *Baggett Transportation Co. v. Hughes Transportation, Inc.*, 8 Cir. 1968, 393 F.2d 710, 718, *cert. denied*, 393 U.S. 936. The court there quoted extensively from Justice Clark's opinion in *United States v. Borden Co.*, 1954, 347 U.S. 514, 518-519, 74 S.Ct. 703, 98 L.Ed. 903, deriving therefrom the inference that such private suits also serve public interests.

The public interest concept and its relation to §2283 have been extensively discussed by this court in the recent case of *Father Nathaniel Machesky, et al. v. W. H. Bizzell, supra.* We there pointed out that "One area in which the command of § 2283 has been held to give way is where the United States is a party." See *Leiter Minerals v. United States, supra.* We found in the *Leiter* case authority for the proposition that the rule of comity embodied in § 2283 must yield to "national" or "superior federal interests." We then cited with approval the case of *Studebaker Corp. v. Gittlin*, 2 Cir. 1966, 360 F.2d 692, where, in the opinion by Judge Friendly, the court found that § 2283 was not a bar to a private action under the Securities and Exchange Act. The court in *Gittlin* observed that §2283 would not have prevented an enforcement action by the Securities and Exchange Commission. It therefore reasoned that a different result should not obtain mere-

ly because public interests were being asserted by a private party:

> "If the policy of the anti-injunction statute is superseded by the need for immediate and effective enforcement of federal securities regulations and statutes, the fact that enforcement here is by a private party rather than the agency should not be controlling." 360 F.2d at 698.

The public interest concept and the need for effective enforcement of a regulatory scheme are no less applicable to the regulation of railroads than to the regulation of securities. Both are of national concern; both are of national dimensions. This is particularly true of situations like that before us in which a carrier proposes to build new trackage. In such circumstances the Supreme Court has found the strongest of public interests:

> "Paragraphs 18 to 22, supra, were considered here in Texas & P. R. Co. v. Gulf, C. & S.F.R. Co. 270 U.S. 266, 70 L.ed. 578, 46 S.Ct. 263, and were declared to be part of the general plan by which Congress intended to promote development and maintenance of adequate railroad facilities. It was there said, p. 277: 'It [Congress] recognized that preservation of the earning capacity, and conservation of the financial resources of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reason-

> able return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. [Cases cited.]
>
> "The Act sought, among other things, to avert such losses.'" *Western Pac. Cal. R. Co. v. Southern Pacific Co.*, 1931, 284 U.S. 47, 50-51, 76 L.Ed. 160, 162.

Based on the foregoing, we conclude that Seaboard in bringing the present suit was engaged in protecting and enforcing public as well as private rights, and that the same suit could have been brought by the Commission itself. Under such circumstances the principle of comity embodied in § 2283 must yield to paramount federal interests. *Father Nathaniel Machesky, et al. v. W. H. Bizzell, supra; Studebaker Corp. v. Gittlin, supra.* See also *Sheridan & Townley v. Garrison*, 5 Cir. 1969, ____ F.2d ____ [No. 25516. August 13, 1969], slip at 14.

II.

Appellant's second objection to the preliminary injunction also relates to comity, but to comity as a principle apart from Section 2283. Tampa argues that if the condemnation proceedings in the state courts were *in personam*, then both federal and state courts

have concurrent jurisdiction over the cause of action and comity requires that each suit proceed to judgment undisturbed by injunctive process. See *Donovan v. Dallas*, 1964, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409; *Kline v. Burke Construction Co.*, 1922, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226. On the other hand, if the condemnation proceeding were *in rem*, then the state courts, having first acquired jurisdiction over the "res," are the only courts entitled to jurisdiction. *Princess Lida of Thurn and Taxis v. Thompson*, 1939, 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285. This argument is wide of the mark.

The cases cited by appellant all pertain to the situation in which two courts, one federal and the other state, assert jurisdiction over the *same* cause of action, or, in the case of suits *in rem*, over the same property. In such circumstances the Supreme Court has found that concurrent jurisdiction exists in both courts if the suits are *in personam*, *Donovan v. Dallas, supra; Kline v. Burke Construction Co., supra*, but only in the first court if the suit is *in rem*. *Princess Lida v. Thompson, supra.*

The case before us involves neither the same cause of action in both state and federal courts, nor a common *res* over which the district court had to assume jurisdiction. The state proceedings in the Florida courts were merely condemnation suits brought under local statutes. The federal proceeding was a suit *in personam* under § 1(20) of the Interstate Commerce Act. Under these circumstances it must be plain that the district court's injunction did not issue to prevent

repetitive suits. Rather, it issued to prevent state proceedings in complete derogation of federal law. *Porter v. Lee*, 1946, 328 U.S. 246, 250, 90 L.Ed. 1199; *Studebaker Corporation v. Gittlin*, supra, at 698. *Cf. Red Rock Cola Co. v. Red Rock Bottlers*, 5 Cir. 1952, 195 F.2d 406 at 409.

A situation analogous to the one before us was presented to the Supreme Court in *Porter v. Lee, supra.* In that case a suit was brought in a federal district court by the Price Administrator pursuant to the Emergency Price Control Act. The Administrator sought to enjoin a landlord from continuing a rent eviction proceeding in the state Justice of the Peace Court since the rents were violative of the Act. The landlord argued: "Since the Justice of the Peace Court action . . . was commenced prior to the Administrator's injunction proceeding in the federal court, the Justice of the Peace Court had acquired sole power to decide the crucial issue and the federal District Court therefore lacked jurisdiction." 328 U.S. at 250. In rejecting this argument, the Supreme Court indicated that there was no obstacle to injunctive process against the state court proceeding where the jurisdiction of the two courts was over separate subject matter, and where the state proceeding was itself a violation of the Act:

> ". . . Here the landlord's eviction proceeding in the Justice of the Peace Court clearly was not an enforcement proceeding authorized by the Act. It was, rather, if the allegations of the Administrator proved to be true, a violation of the Act. The state court's jurisdiction was based

on state law and not on § 205 of the Price Control Act. It was therefore not part of the 'concurrent' jurisdiction contemplated by § 205. Over the enforcement proceedings contemplated by that section not only did the District Court acquire jurisdiction first, but the state court never acquired any jurisdiction at all. It was consequently within the power of the federal District Court to grant the injunction provided the Government succeeded in proving the merits of its case." 328 U.S. at 250.

We detect no controlling difference between the federal enforcement proceeding in *Porter* and the federal enforcement proceeding in the case before us. *Porter* involved a state eviction suit; here we deal with a state condemnation suit. In *Porter* there was governmental enforcement of public rights; here there is private enforcement of public rights. In *Porter* there was no concurrent jurisdiction between state and federal courts; hence no conflicts of jurisdiction or problems of comity. Here there is likewise no concurrent jurisdiction. In light of these similarities we find no substance to the argument that comity or jurisdictional barriers prevent the issuance of a federal injunction. We note that comity was no obstacle to an injunction in Porter where the anti-injunction statute was held inapplicable.[5] It should therefore be no obstacle here.

[5] In *Porter v. Dicken*, 1946, 328 U.S. 252, a companion case to *Porter v. Lee*, the Supreme Court found that the Price Control Act was "an implied legislative amendment to § 265 [the forerunner of § 2283], creating an exception to its broad prohibition." 328 U.S. at 255. As a result of that decision, the anti-

As a general rule principles of comity will not bar a federal injunction where "there are circumstances which bring the case within one of the exceptions to § 2283...." 1 A, W. M. Moore, *Federal Practice*, ¶ 0.208[4] (1965). See *Studebaker Corp. v. Gittlin, supra.*

III.

We turn finally to the defense of intrastate commerce which Tampa raised in the court below. While strictly speaking this issue goes to the merits of the controversy, not to the propriety of a preliminary injunction, and therefore lies at the periphery of this appeal, see *Doeskin Products, Inc. v. United Paper Co.*, 7 Cir. 1952, 195 F.2d 356, 361; *Chicago Great Western Ry. Co. v. Chicago, B & Q R. Co.*, 8 Cir. 1952, 193 F.2d 975, 978, it has nonetheless been fully briefed and argued by the parties in this court, and an extensive brief on the question has been filed by the government.[6] We have also before us a ruling by the trial judge that leaves no doubt of his intention to fully try the

---

injunction statute was only obliquely mentioned in *Porter v. Lee*. See 328 U.S. at 251, n.3. It does appear, however, that both cases are authority for the express authorization exception to § 2283.

[6]During oral argument it became apparent that the main actor, the Commission, was not on stage. It was a ghostlike performance like seeing *Hamlet* without Hamlet. The I.C.C. and the Department of Justice were therefore asked to submit an amicus brief. They have responded to that post-argument request by filing their brief with the court. Copies were sent to both parties and responses to the government's brief have been received and carefully considered.

matter of interstate commerce on remand. Under these circumstances we think the interests in conserving judicial time and the expense of litigation compel us to suggest that the district court's decision rejecting principles of collateral estoppel may have been premature.

Tampa argued before the district court that investigation of the interstate or intrastate character of its proposed railroad would not constitute a collateral attack upon the order of the Interstate Commerce Commission. Relying on several somewhat dated Supreme Court cases, see *Texas & Pacific R. Co. v. Gulf, C. & S.F. R. Co.*, 1926, 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578; *Piedmont & Northern R. Co. v. United States*, 1930, 280 U.S. 469, 50 S.Ct. 192, 74 L.Ed. 551; *United States v. Idaho*, 1936, 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070. *Powell v. United States*, 1937, 300 U.S. 276, 57 S.Ct. 470, 81 L.Ed. 643, Tampa insisted that the matter of interstate commerce, since it affected the Commission's jurisdiction, was open for independent investigation by a federal district court in a proceeding under § 1(20) of the Act even though there was outstanding an order of the Commission denying Tampa a certificate. We must disagree.

Tampa's cases were all decided during what might be termed the "era of negativity." During this period the Supreme Court followed the negative order rule which denied courts the power to review agency decisions that imposed no affirmative burdens or obligations upon the applicant. The rule was regarded as an aspect of the doctrine of administrative finality

under which courts declined to review interim steps in an administrative proceeding. In *Piedmont & Northern R. Co. v. United States,* supra, the Supreme Court held that a statutory three judge court did not have jurisdiction under the Urgent Deficiencies Act, 28 U.S.C.A. § 47, to review the denial of a certificate of public convenience and necessity. The court observed that the order denying the certificate "is entirely negative. It is not susceptible of violation and cannot call for enforcement. It does not finally adjudicate the railway's standing; nor does it enjoin it to do or refrain from doing anything." 280 U.S. at 477. Taking the view that the negative order doctrine barred review by a three judge court, the direct appeal to the Supreme Court was dismissed for want of jurisdiction.

The court in *Piedmont* did not discuss the impact of its holding on enforcement proceedings under § 1(20) of the Act which had been at issue some four years earlier in *Texas & P. R. Co. v. Gulf, C. & S.F. R. Co., supra.* Nonetheless the court made clear in *Powell v. United States, supra,* that review of the validity of a negative order was available in an enforcement proceeding under § 1(20) of the Act. The Court stated:

> "The purpose of §§ 1(18) to 1(22) of the Act was to empower the commission in proceedings instituted by a carrier proposing to engage in transportation over or by means of an additional or extended line authoritatively to decide whether it would be in the public interest. Unless the project is one covered by § 1(18), the

> commission is not authorized by the Act to consider whether it is in the public interest and, for lack of jurisdiction to determine that question, it must deny the application. Upon presentation by the carrier of application for a certificate, the commission, for the purpose of determining whether it is authorized by the Act to consider the merits, may pass incidentally upon the question whether the project is one covered by § 1(18). But the decision of that question is for the court in either a suit to set aside an order granting a certificate or in a suit under § 1(20) to enjoin a violation of § 1(18). The function of the court is to construe that paragraph; that of the commission is to determine whether the project, if it is one covered by the paragraph, is in the public interest." 300 U.S. at 287.

The rule that a court in a § 1(20) proceeding has the obligation to determine whether the Commission had the jurisdiction to deny the certificate on its merits is based on the view that the Commission cannot be the final arbiter of its own power. That decision lies with the courts. However, the problem on this appeal is not, as it was in Powell, whether *a* court shall pass on the Commission's power to deny a certificate to Tampa, but *which* court is the proper forum for such a determination. The court in *Powell* noted that such a determination was proper in "either a suit to set aside an order granting a certificate or in a suit under § 1(20) to enjoin a violation of § 1(18)." However, neither the court in *Powell* nor the court in *Texas*

& P. R. Co. v. Gulf, C. & S.F.R. Co., faced or passed upon the possibility of concurrent jurisdiction in *both* the three judge court and the § 1(20) court. Statements that "either" a § 1(20) court or a three judge court could inquire anew into jurisdictional issues such as the interstate character of the railroad or the nature of its trackage must be read in light of the fact that jurisdiction in both courts was not contemplated. If the issue was the denial of a certificate of public convenience and necessity, as it was in *Piedmont* and *Texas P. R. Co. v. Gulf*, then the negative order rule precluded review in a three judge court. On the other hand, if the plaintiff sought to set aside an order of the Commission that was not negative in character, the exclusive forum for review was a three judge court. *Powell v. United States*, 300 U.S. at 288-289; *United States v. Idaho, supra.* In either case a court would review de novo the jurisdictional basis for the Commission's actions. Nowhere was it stated that *both* courts were expected to re-examine matters relating to the Commission's jurisdiction.

Subsequent to *Texas & P. R. Co. v. Gulf, C. & S.F.R. Co., Piedmont & N. R. Co. v. United States, United States v. Idaho*, and *Powell v. United States*, the United States Supreme Court repudiated the negative order rule. *Rochester Telephone Corp. v. United States*, 1939, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147. In so doing the Court described the very type of situation that had prevented review in *Piedmont*, and disapproved its earlier decisions insofar as they were affected by the artificial distinction between negative and affirmative orders:

> "An order of the Commission dismissing a complaint on the merits and maintaining the status quo is an exercise of administrative function, no more and no less than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same.... We conclude, therefore, that any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding." 307 U.S. at 142-143.

See also 307 U.S. at 133, n. 11, where *Piedmont* was repudiated.

On the same day as the decision in *Rochester*, the Supreme Court reaffirmed its rejection of the negative order rule in *United States v. Maher*, 1939, 307 U.S. 148, 59 S.Ct. 768, 83 L.Ed. 1162, permitting review by a three judge court of the denial by the Interstate Commerce Commission of a certificate of public convenience and necessity. Some ten years later the court once again announced that the negative order doctrine had no further vitality. In *United States v. Interstate Commerce Commission*, 1948, 337 U.S. 426, 436, 69 S.Ct. 1410, 93 L.Ed. 1451, 1460, the court informs us that the doctrine of negativity was "wholly abandoned in *Rochester Teleph. Corp. v. United States*, 307 US 125,

83 L ed 1147, 59 S Ct 754." Under these circumstances no further burial ritual would seem required. Today it is clear, contrary to the teachings of *Piedmont*, that a carrier may receive review in a three judge district court of the denial by the Interstate Commerce Commission of his petition for a certificate of public convenience and necessity. 28 U.S.C.A. §§ 2321-2325; *United States v. Maher, supra; Northwestern Pacific R. Co. v. United States*, N.D. Calif., 1964, 228 F.Supp. 690, *aff'd per curiam*, 379 U.S. 132; *Chicago, Milwaukee, St. P. & P. R. Co. v. United States*, E.D. Wis., 1963, 214 F.Supp. 244, *reversed on other grounds*, 380 U.S. 448; *State of Georgia v. United States*, N.D. Ga., 1957, 156 F.Supp. 711, *aff'd per curiam*, 356 U.S. 273.

With the way open for direct review of the validity of the Commission's order in a statutory three judge court, the question is raised whether such court is the exclusive forum for the adjudication of jurisdictional questions, or whether they may also be considered in a § 1(20) proceeding. We believe that all issues essential to the judgment of the Commission, including matters relating to its jurisdiction, should be challenged only in the statutory three judge court. Consideration of such issues in a § 1(20) proceeding amounts to a collateral attack upon the validity of the Commission's order.

Our conclusion that the statutory three judge court provided for in 28 U.S.C.A. §§ 2321-2325 is the sole forum for review of issues decided by the Commission finds support in *United States v. Southern Railway*

Company, 5 Cir. 1966, 364 F.2d 86, *cert denied*, 386 U.S. 1031.[7] In that case we held that suits by the United States for civil penalties resulting from the violation by a carrier of the Commission's order could not be defended on grounds that were reviewable before a statutory three judge court. In holding that the district court was in error in considering such defenses, our court observed:

> "... The requirement of the statute that Administrative and Judicial Review be applicable to all cases of suits to enforce, enjoin, suspend or set aside orders of the Commission, has a direct reference to 28 U.S.C. § 2321, in which the Congress directed that the procedure to be employed in such cases required the creation of a three-judge court. Explicit in the language of the legislation is the requirement that judicial relief, other than for the payment of money or the collection of fines, penalties or forfeitures, must be obtained under §§ 2321-2325 of Title 28. A long line of Supreme Court cases establishes the principle that where Congress has provided administrative and judicial review procedures which are designed to permit agency expertise to be brought to bear upon particular problems, the prescribed procedures are exclusive, and this is true even though Congress may not have expressly provided for the exclusiveness of the statutory procedure." 364 F.2d 91.

---

[7]See also *United States v. Southern R. Co.*, 4 Cir., 1967, 380 F.2d 49, 53-54.

The rule relied upon in *United States v. Southern Railway Company, supra,* is an application of the doctrine of exhaustion of administrative remedies, see *Whitney National Bank v. Bank of New Orleans,* 1965, 379 U.S. 411, 422, 85 S.Ct. 551, 13 L.Ed.2d 386, 395, and as such is not limited only to matters within the agency's expertise. One of its purposes is to discourage the piecemeal litigation which necessarily would result if parties could begin a suit before an agency, then disengage from combat, and challenge the agency's ruling in a collateral enforcement proceeding at some later date. See *United States v. Ruzicka,* 1946, 329 U.S. 287, 67 S.Ct. 207, 91 L.Ed. 290; *Callanan Road Improvement Co. v. United States,* 1953, 345 U.S. 507, 73 S.Ct. 803, 97 L.Ed. 1206. The rule also avoids unnecessary duplication and conflicting litigation likely to result where two courts have concurrent jurisdiction to resolve the same issues. *Whitney National Bank v. Bank of New Orleans, supra.* Both considerations have relevance whether the issues sought to be raised in a collateral proceeding are committed to the expertise of the agency, see *United States v. Southern Railway, supra,* or whether they are jurisdictional and go to the power of the administrative tribunal. See *Myers v. Bethlehem Shipbuilding Corp.,* 1938, 303 U.S. 41, 49-51, 58 S.Ct. 459, 82 L.Ed. 638, 643-644; *Callanan Road Improvement Co. v. United States, supra; Interstate Commerce Commission v. Cowan,* D. South Dakota, 1955, 127 F.Supp. 247, 249. In either case the policy of exhausting administrative remedies in the reviewing court specifically designated for such purpose is served. To insure fealty to such policy, and to preserve the statutory mode of review, a court in a collateral

proceeding may invoke principles of collateral estoppel. See *Meyers v. Famous Realty, Inc.*, 2 Cir. 1959, 271 F.2d 811, 817, *cert. denied*, 362 U.S. 910; *Southwest Freight Lines v. Interstate Commerce Commission*, 8 Cir. 1950, 184 F.2d 149, 151; *Schwartz v. Bowman*, S.D. N.Y. 1965, 244 F. Supp. 51, 67, *cert. denied*, 385 U.S. 921; *Interstate Commerce Commission v. Cowan, supra; United States v. Railway Exp. Agency*, D. Del., 1951, 101 F.Supp. 1008, 1012; *Interstate Commerce Commission v. G. & M. Motor Transfer Co., Inc.*, W.D. N.C. 1945, 64 F. Supp. 302; *Interstate Commerce Commission v. Consolidated Freightways*, S.D. N.D. 1941, 41 F.Supp. 651, 655. Such principles are properly applied to protect the findings of an administrative tribunal, *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, D.C. Cir. 1968, 404 F.2d 804, 809, *cert. denied*, 37 U.S.L.W. 3308 (Feb. 24, 1969), as well as the findings of a court, and may be invoked to prevent relitigation of jurisdictional findings, *Stoll v. Gottlieb*, 1938, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104; *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., supra; Seatrain Lines v. Pennsylvania R. Co.*, 10 Cir. 1953, 207 F.2d 255, 257; *Interstate Commerce Commission v. Cowan, supra*, no less than findings on the merits. Under these circumstances we think the trial court should not have acquiesced, at least on the basis of appellant's cases, to the request that the issue of interstate commerce be tried anew.

For some reason, not apparent on the record, the court refused to re-examine the Commission's ruling that Tampa's proposed railroad was not a spur or industrial track within the exemption of § 1(22). Yet

this issue is no less jurisdictional than the allegation that the defendant is not an interstate carrier. See *Texas & P. R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U.S. at 274; *United States v. Idaho, supra.* Both questions should have been foreclosed in this § 1(20) proceeding. Only questions not essential to the Commission's ruling were open for review. See Restatement of Judgments, §§ 68(0) and 68(p); *Hyman v. Regenstein*, 1958, 258 F.2d 502, 510, *cert. denied*, 359 U.S. 913.

The result that we have reached is not affected by the fact that a § 1(20) proceeding is not strictly speaking an action to enforce an order of the Commission, but an action to enjoin a violation of § 1(18), § 1(19), or § 1(20) of the Act. The form the issues may take in a subsequent proceeding is not material to the application of collateral estoppel so long as the issues were in fact determined in the original suit. "In such cases, it is . . . immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief. * * *" American Jurisprudence, Judgments, Section 371; *Hyman v. Regenstein*, supra, at 510. *Cf. Meyers v. Famous Realty, Inc., supra; I.C.C. v. Cowan, supra.* Complete identity of the parties or mutuality of estoppel is also not required where the party against whom the estoppel is applied has already had his day in court. *Seguros Tepeyac, S.A. Compania Mexicana de Seguros Generales v. Jernigan*, 5 Cir. 1969, ____ F.2d ____ [No. 25651, April 15, 1969]; *United States v. Webber*, 3 Cir. 1968, 396 F.2d 381, 385.

IV.

Tampa's final argument against the application of collateral estoppel involves an allegation of changed circumstances. Tampa makes much of changes that were made in its proposed railroad subsequent to the Commission's ruling and denial of a certificate. Tampa argues that these changes "remove any possible contention that the Tampa Railroad is seeking to obtain interstate authority by a collateral attack upon an order of the Commission denying it interstate operating rights."

Whether or not Tampa has so modified its proposed railroad as to take itself out from under the doctrine of collateral estoppel cannot be determined on the record before us. Such a determination must abide factual inquiries by the district court on the extent and nature of Tampa's modifications. However, a few words on the standard which Tampa must meet are appropriate.

In *Amerada Petroleum Corp. v. Federal Power Com'n*, 8 Cir. 1964, 334 F.2d 404, *reversed*, 379 U.S. 687, the court had before it a jurisdictional issue strikingly similar to the one here presented. The court noted that in an earlier suit involving some of the same parties, *North Dakota v. Federal Power Commission*, 247 F.2d 173, it had sustained a decision by the Federal Power Commission in which the Commission had declined jurisdiction over certain natural gas contracts on the ground that the gas had been produced, sold and transported only in intrastate commerce. Subse-

quent to the Commission's ruling and after this first decision by the Eighth Circuit, the gas producers had entered into new contracts with their distributors, and the Commission had asserted jurisdiction over the natural gas covered by the new contracts. On appeal, the Eighth Circuit set aside the order of the Commission, holding that under the doctrine of collateral estoppel the question of interstate commerce was foreclosed by the court's earlier decision. In so deciding, however, the court noted that "Unlike the facts of the former case, this appeal from the present administrative ruling concerns the Commission's passage upon new contracts providing for future sales by Petitioners, as well as additional producers, of different quantities of gas destined to travel over expanded pipelines in the MDU system." 334 F.2d at 411. The changes that had occurred subsequent to the Commission's ruling were therefore quite substantial.

On certiorari, the Supreme Court reversed the Eighth Circuit on its application of collateral estoppel. *Federal Power Commission v. Amerada Petroleum Corp.*, 1965, 379 U.S. 687, 85 S.Ct. 632, 13 L.Ed.2d 605. The rationale for the court's decision is briefly stated as follows:

> "The Court of Appeals thought that its decision in North Dakota v. Federal Power Comm'n, 247 F2d 173, brought collateral estoppel into play in the present case. 334 F2d 404, 411-412. But that rule has no place here for no judgment governing past events is in jeopardy, only the scope of future regulations that involves dif-

ferent events and transactions." 379 U.S. at 690.

The test established by the Supreme Court in *Amerada* for the avoidance of collateral estoppel on the grounds of changed circumstances would seem to require that the change between the old and the new facts be so substantial that the new facts constitute in effect "different events and transactions." In *Amerada* that test was easily met since the changed circumstances involved new contracts, new producers, and several hundred miles of new pipeline. It must also be noted that *Amerada* involved the attempted use of collateral estoppel to foreclose governmental regulation in the public interest. In such circumstances there is a natural reluctance to apply collateral estoppel in all its vigor lest a prior adjudication, involving only intrastate activities, become a method and a license for unbridled interstate expansion.

The instant case involves policies almost the reverse of those present in *Amerada*. Here the Commission has asserted its jurisdiction, and the carrier involved, disappointed with the results of its encounter, has ignored not only the Commission's ruling, but the statutorily prescribed method of review. Under these circumstances collateral estoppel must be rigorously applied lest all carriers frustrate the rulings of the Commission merely by alleging some slight modification in their proposed plans. No plan is so constituted that it will not admit of modification if the aim of such sacrifice is a chance to relitigate issues already considered and resolved by the Commission.

In the case before us we cannot subscribe to a "one inch" rule whereby the removal of a few railroad ties becomes a significant event. Nor can we admit that all changes are significant. At the very least, modifications in Tampa's proposed railroad must bear directly upon the issue sought to be foreclosed, here interstate commerce. Absent such a relationship, the change is of no avail in suspending the effects of collateral estoppel. Finally the proposed modifications must constitute such substantial changes that the court can say in good conscience that the ruling of the Commission is not "in jeopardy," *Federal Power Commission v. Amerada Petroleum Corp., supra*, and that the case before it involves in effect "different events and transactions." If these things may be said, then the court is justified in re-examining issues that are similar to those presented to the agency. Events and circumstances do change and therefore the opportunity for a second look is sometimes justified. But the need to avoid giving a judicial blessing to the circumvention of the Commission's order, and the need to prevent the disregard of a prescribed mode of review, are equally valid considerations. Tampa must not be permitted to subvert the role which Congress has assigned to the Commission, and by means of a unilateral decision to modify its proposed railroad, to render the Commission's order a nullity. If, in fact, the district court is faced with new matter and new circumstances which justify treating Tampa's case as if there never had been an order of the Commission, then the burden of such a showing must be heavily on Tampa.

We note in conclusion that Tampa's afterthoughts and postscripts on the modifications to its proposed railroad must now be examined in light of the proposals previously presented to the Commission. In the course of such examination there must be no sanction to the proposition that every minute deviation from a carrier's application to the Commission furnishes a detour or escape route into the state courts. Tampa's gambit should be analyzed with the principle in mind that forum shopping and litigation fragmentation are anathema to sound judicial administration. Accordingly, on remand the trial court must determine whether Tampa has modified its original proposal to the extent necessary to avoid the application of collateral estoppel.

The judgment of the district court granting the preliminary injunction is AFFIRMED and the cause is REMANDED for further proceedings not inconsistent with this opinion.

BROWN, Chief Judge, Concurring:

I concur fully in the Court's decision and the formidable opinion voiced for us by Judge Goldberg. My reservations are not that we hold too much or say too much. My doubts are that on the structure erected we do too little, we say too little. My difference is confined to Part IV and then only in a limited way. I agree fully that the burden is heavy — indeed impossible from a practical standpoint — of showing

a change of conditions to flee before the inexorable restraint of collateral estoppel.[s]

But to that impossible burden I would add an absolute obstacle. The District Court is not the place to thresh this issue out. If there has been a demonstrable change of conditions, then that change must be proved before and determined by the ICC.

The statute is imperative, the prohibition peremptory. "No carrier subject to this chapter," says §1(18), "shall undertake construction * * * of a new line * * * *unless* and *until* there shall first have been obtained from the [ICC] a certificate * * * [of] * * * public convenience and necessity * * *." (See note 2 of the Court's opinion). (Emphasis added). To do so invokes not only the imminence of a §1(20) injunction at the hands of the Government or, we now correctly hold, a private competitor, whose selfish interests take on the appealing color of public concern. It invokes serious criminal and civil sanctions as well. (See, e.g., §1(20), note 1 of the Court's opinion.)

The whole idea behind the structure of the Act is to commit carrier-railroad problems to a body having an expertness in the business of railroading. Now

---

[s]My full concurrence is not diminished by this comment. But I think the opinion unnecessarily overworks collateral estoppel. To me the Interstate Commerce Act and and the rich history emerging from the niggardly resistance of the Judiciary toward it down to contemporary recognition of the need for the fullest exercise of its statutory powers, would now recognize that on simple principles of administrative law, the 3-Judge Court is the sole — the word is sole — means of review.

events have long since loosened the laissez faire bonds imposed by a hostile Judiciary.[9] Behind §1(18) is a congressional determination born of scandals that rocked the nation in high and low places growing out of the promotion of railroads, the saddling of the investing and shipping public with heavy burdens occasioned by uneconomic expansion of facilities.

The guardian — certainly at least since the Urgent Deficiencies Act[10] for 3-Judge review of ICC orders — has been the ICC. It is incongruous to think that Congress would commit to Federal Judges — whose lifetime tenure assures independence, but whose Commission invests them with not one ounce more prescience than held before — this delicate decision on what is needed for a National transportation system.[11]

---

[9]See C. Swisher, American Constitutional Development 813-45 (2d ed. 1954).

[10]Act of Oct. 22, 1913, Ch. 32, 38 Stat. 208, 220. Now see 28 USCA §2325.

[11]The Interstate Commerce Act declares this to be the policy:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions — all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means,

Here the problem appears to be the relatively innocuous one of a 30-mile addition. But if it can be done here, there is no reason why a Federal Judge — whose fact decisions will then bear the buckler and shield of F.R. Civ. P. 52(a) — cannot do the same thing on a major addition within a given state to serve some new industrial traffic.[12]

The prohibition in §1(18) is flat and, more importantly, in terms of the *status* of the constructing carrier. Unlike spurs and switching connections (see note 3 of the Court's opinion), §1(18) does not confine the requirement for a certificate of public convenience and necessity to those extensions or facilities which will be *in* or a part of *interstate* commerce. The prohibition is against the construction of any extension of its *line* or construction of a new *line* by a "carrier subject to this chapter." It is not specifically tied to the intra or inter-state nature of such line.

None of these considerations is minimized by some of the older Supreme Court cases. These were the product of the "era of negativity" (Part III of the Court's opinion) — a name given to the ruling about negative orders, but which more accurately describes the at-

---

adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act shall be administered and enforced with view to carrying out the above declaration of policy.

49 USCA preceding §§1, 301, 901 and 1001.

[12]Appeal to the Court of Appeals is hardly much assurance for the fulfillment of a national transportation policy. What wisdom do we draw on?

titude of Judicial hostility. When that spurious dialectic was rejected, all fell before it. No longer would the promoter have his nice choice: go before the ICC and if it declined to grant permission, then proceed with construction, defending a §1(20) injunction on the grounds of no interstate commerce. Now all is to be channeled into and through the ICC just as §1(18) says, with the relief by Judges to come only in a 3-Judge case on the limited review afforded. And in any event, if — and the if is a very, very big one — anything is left to initial judicial determination by the District Court, the case calls imperatively for the full exercise of primary jurisdiction to send the "change of condition" problem and the renewed question of intra or inter-state character of the line to the ICC for initial hearing and determination. We did just that concerning a serious question of motor carrier exemption under the Interstate Commerce Act. *Agricultural Transportation Ass'n v. King*, 5 Cir., 1965, 349 F.2d 873.[13]

---

[13]Probably our most spectacular application of primary jurisdiction was in private suits over the amount of gas royalties due the landowner-lessor by a producer-lessee subject to the Natural Gas Act, 15 USCA §717 et seq., Regulation by the Federal Power Commission depended on the jurisdictional issue of whether gas royalties were "sales of gas for resale in interstate commerce." Reversing two judgments after jury trials, we remanded with directions to the District Court to direct the parties to seek declaratory orders from FPC. Weymouth v. Colorado Interstate Gas Co., 5 Cir., 1966, 367 F.2d 84; J.M. Huber Corp v. Denman, 5 Cir., 1966, 367 F.2d 104. Since then, the FPC has held that these royalties are sales subjecting the amounts payable to appropriate FPC ceilings. The extraordinary nature of a reference to the FPC to determine its own jurisdiction is pointed up by the penetrating partial dissent of Commissioner Carver. Denman v. J.M. Huber Corp., Opinion No. 562, Docket Nos. RI67-113, -114, -310, -400 (July 23, 1969).

Even more recently we affirmed a District Court which

Railroading is big business. It is big business with big problems, big debts, big competition and big inroads on its revenues. It involves matters of great public importance. It needs the interested concern of knowledgeable people having a judgment born of long experience and beyond that obtainable as a single shot proposition by a Judge on a case-and-controversy record in a private suit between intense competitors.[14]

---

stayed a private antitrust suit pending determination by the Federal Communications Commission of the validity of a tariff provision prohibiting "foreign connections" on telephone company equipment. Carter v. American Tel. & Tel. Co., 5 Cir., 1966, 365 F.2d 486, *cert. denied*, 1967, 385 U.S. 1008, 87 S.Ct. 714, 17 L.Ed.2d 546. This case is powerful refutation to those purists who look on abstention as some major evil, W.S. Ranch Co. v. Kaiser Steel Corp., 10 Cir., 1967, 388 F.2d 257, 264-65 (dissenting opinion), *rev'd* 1968 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 835.

The antitrust plaintiffs, resisting primary jurisdiction reference to the bitter certiorari end, soon found a welcome forum and shortly were the beneficiaries of sweeping orders by FCC which shortly precipitated a healthy settlement.

Primary jurisdiction does not oust the Court of its jurisdiction or ultimate duty to decide. It just postpones decision. See Southwestern Sugar and Molasses Co. v. River Terminals Corp., 1959, 360 U.S. 411, 420, 79 S.Ct. 1210, ——, 3 L.Ed.2d 1334, 1342, 1959 AMC 1631, 1638-39. In view of this I do not regard our instant decision and opinion to foreclose use of a primary jurisdiction reference by the District Judge on remand. As in *Carter*, *supra*, this just might turn out to be a boon to Tampa since it would afford opportunity for an evidentiary reexamination in depth on the question of the interstate character of the line. This is especially so since the ICC liberally allows subsequent petitions for reconsideration quite apart from primary jurisdiction reference.

[14]Our own experience in this case bears this out. The oral argument revealed that the Court was helpless in umpiring this dispute which had obvious overtones of great public importance, which with the luxury the case-and-controversy system permits, were completely ignored as each contestant in the

It is big business. But it is not our business. It is the business of the ICC and Judge business thereafter only in the narrowest sense of whether the ICC order is "in accordance with law", 5 USCA §706.

The return to the Trial Court will be a water haul for Tampa.

---

liberties the system allows, if not encourages, jousted in its own self interest. One side held tenaciously to the "era of negativity" of *Piedmont supra*, the other had paid scant attention to its subsequent history. It became evident that the Government had a stake and the Court on its own motion by a detailed letter directive called for extensive briefs from the Attorney General. Then the public interest doors began to open.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

EXHIBIT A

INTERSTATE COMMERCE COMMISSION

Served SEPTEMBER 9, 1966

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

This Page Left Blank Purposely

Finance Docket No. 23688[1]

ATLANTIC COAST LINE RAILROAD CO. AND SEABOARD AIR LINE RAILROAD CO. CONSTRUCTION BETWEEN FORT MEADE AND PINEY POINT, FLA.

Decided

---

1. In Finance Docket No. 23688, present and future public convenience and necessity not shown to require joint construction and operation by the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad Company of a line of railroad in Polk, Hardee and Manatee Counties, Fla. Joint application denied.

2. In Finance Docket No. 23718, present and future public convenience and necessity not shown to require construction and operation by the Tampa Phosphate Railroad Company of a line of railroad in Hillsborough and Polk Counties, Fla. Application denied.

Richard A. Hollander, David E. Wells, Phil C. Beverly, Prime F. Osborn, Ralph C. Dell, James E. Howe, III, and Erle J. Zoll, Jr., for Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company.

---

[1]Embraces also Finance Docket No. 23718, Tampa Phosphate Railroad Co. Construction in Hillsborough and Polk Counties, Fla.

James B. McDonough, Jr., David C. G. Kerr, A. Alvis Layne, and *William A. Chestnutt* for Tampa Phosphate Railroad Company.

Richard A. Hampton and Warren M. Goodrich for intervener supporting application in Finance Docket No. 23688.

John F. Donelan, John A. Caldwell, A. Byrne Litschgi, John M. Cleary, Charles W. Loe, Jr., W. Reece Smith, Jr., Henry Williams, Jr., A. Alvis Layne and *William A. Chestnutt* for interveners supporting application in Finance Docket No. 23718, opposing application in Finance Docket No. 23688.

Phil J. O'Hara for intervener opposing application in Finance Docket No. 23688.

Paul R. Bennett, T. C. Bolin, J. T. Camp, Howard W. Davis, N. A. Erody, Marvin L. Geiger, Leslie A. Goodman, W. Clinton Green, John S. Griffin, Frank E. Hamilton, J. W. Hayes, William J. Hickey, Edward J. Hickey, Jr., James L. Highsaw, Jr., J. H. Lee, William G. Mohoney, J. W. Martin, C. A. Roberts, T. R. Roebuck, H. A. Stokes, Henry R. Stroemer, and J. O. White for protestants.

REPORT AND ORDER
RECOMMENDED BY PAUL J. CLERMAN,
HEARING EXAMINER

Atlantic Coast Line Railroad Company, (Coast Line) and Seaboard Air Line Railroad Company (Seaboard),

herein sometimes called the Railroads, common carriers by railroad subject to Part I of the Interstate Commerce Act, by joint application filed June 14, 1965, in the title proceeding, seek a certificate of public convenience and necessity under section 1(18-20) of the act authorizing the joint construction and operation of a new line of railroad in Polk, Hardee, and Manatee Counties, Fla.[2] The proposed line would extend a distance of approximately 44 miles, from a connection with Coast Line's Naples Branch at a point south of Fort Meade, thence westward crossing Seaboard's Boca Grande and Sarasota Branches, and connecting with Coast Line's Sarasota Branch at Piney Point. The western terminus of the proposed line would be at Port Manatee, a new port proposed to be constructed on the shore of Tampa Bay, about 20 miles south of Tampa. Publication of notice of the proposed construction was duly effected, and a return to questionnaire was filed by the applicants on August 12, 1965. Protests to the application were filed on behalf of Local 1402, International Longshoremen's Association (Longshoremen), and on behalf of various railway labor organizations (Brotherhoods). A joint protest was filed by the Greater Tampa Chamber of Commerce, the City of Tampa, and the Tampa Port Authority, herein sometimes referred to collectively as the Tampa Group.

In the embraced proceeding, by application filed July 1, 1965, the Tampa Phosphate Railroad Company (Tam-Phos), incorporated in Florida on June 29, 1965, as a common carrier by railroad, but not yet so

---

[2]All points mentioned are in Florida, unless otherwise indicated.

operating, seeks a certificate of public convenience and necessity under section 1 (18-20) authorizing the construction and operation of a new line of railroad in Hillsborough and Polk Counties. This proposed line would extend approximately 30 miles, from a point near Pierce thence in a general northwesterly direction to its western terminus at Port Sutton, on the eastern shore of Hillsborough Bay immediately south of the City of Tampa. About midway the proposed line would cross Seaboard's Sarasota branch, and near its western terminus it would cross Coast Line's Sarasota branch, but the proposed line would not connect with the line of any other common carrier by railroad. Also to be constructed are such auxiliary, team, switching, and side tracks as may be necessary for the line to reach the points of connection with track which may be constructed from any phosphate mines or plants located in Hillsborough or Polk Counties desiring to be served by the proposed line. Notice of the proposed construction was duly published and a return to questionnaire was filed by applicant on September 29, 1965. Protests to the application were filed by the Railroads and the Brotherhoods.

For convenience, Finance Docket No. 23688 will be sometimes referred to as the Piney Point application or case and Finance Docket No. 23718 as the Tam-Phos application or case, and the lines proposed to be constructed will be called the Piney Point line and the Tam-Phos line, respectively.

These applications were assigned for hearing before the examiner and the recommendation of appropriate

orders thereon accompanied by the reasons therefore. Hearings have been held at which the Piney Point application was supported by the Manatee County Port Authority (Manatee) and opposed by Tam-Phos, the Tampa Group, the Longshoremen, and the Brotherhoods.[3] The Tampa Group appeared in support of the Tam-Phos application, and the Railroads and the Brotherhoods appeared in opposition thereto. United Public Action, a non-profit organization incorporated in Florida, appeared in opposition to both applications but presented no evidence. Subsequent to the hearings herein, Port Sutton, Inc., (PSI) and The Phosphate Terminal Company, (PTC), affiliated corporations, of Tampa, were permitted to intervene in both proceedings. Briefs have been filed.[4]

Preliminary Matters - As later discussed, these proceedings are related in that, among other things, the respective applicants seek authority to serve shippers located in the same general producing area of central Florida in the transportation of phosphate rock and allied products to the west coast of Florida for trans-

---

[3]Order of Railway Conductors and Brakemen; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood of Railroad Trainmen; Brotherhood of Locomotive Engineers; Brotherhood of Locomotive Firemen and Enginemen; Railroad Yardmasters of North America, Inc.; Transportation-Communication Employees Union; International Association of Machinists; and Railway Labor Executives Association.

[4]The Railroads filed a joint brief in the Piney Point case. Coast Line, Seaboard, and Tam-Phos filed separate briefs in the Tam-Phos case. The Tampa Group filed a combined brief in both cases. Tam-Phos, PSI, and PTC filed a joint brief in the Piney Point case. Combined briefs in both cases were filed by the two protestants last named in footnote 3.

shipment beyond by vessel in coastwise and export movement. Initially these matters were assigned for hearing before the examiner at the same time and place, the separate order in the Tam-Phos case providing that:

> . . .on the basis of representations made when the hearing is called, the examiner shall determine whether the record in (the Tam-Phos case) shall be joint with the record in the (Piney Point case) . . .

Subsequently, at Tam-Phos's request the hearing in the Tam-Phos case was postponed, the parties being advised, however, that the record in the Piney Point case would be "held open for later consolidation with the record in (the Tam-Phos case) when the hearing in that case is held."

Ultimately, separate hearings were held in these proceedings. The hearings in the Piney Point case were concluded December 14, 1965, at Tampa. The hearings in the Tam-Phos case, opened at Tampa on December 8, 1965, were later continued at Tam-Phos's request to Washington, D. C., and concluded January 6, 1966. The continuation was opposed by Coast Line and Seaboard, the former moving to dismiss the Tam-Phos application for want of prosecution, and the latter moving to dismiss that application, or, in the alternative, to separate the records in these proceedings so that they might be considered separately. By order dated December 30, 1965, (a) these motions were denied, and

(b) the records in these proceedings were consolidated for consideration and disposition.

By motion filed January 25, 1966, Tam-Phos seeks reconsideration and vacation of the above mentioned order to the extent that it provided for consolidation of these proceedings, and prays that the examiner's recommended report and order in the Tam-Phos case be withheld until there shall have been disposed of certain petitions filed with the Commission and the courts whereby PSI seeks leave to intervene in a proceeding, herein called the *merger* case.[5] Tam-Phos' motion is still pending before the Commission. However, pursuant to the outstanding orders of the Commission above set forth, consolidating these proceedings for consideration and disposition, these proceedings will be considered by the examiner on a common record and disposed of in a single report.

The Railroads move to strike portions of the brief filed by Tam-Phos on the ground that specific refer-

---

[5] *Seaboard Air Line R. Co.—Merger—Alantic Coast Line*, 320 I.C.C. 122, decided December 2, 1963, in which the Commission authorized a merger of Coast Line and Seaboard. In *Florida East Coast Railway Company v. United States*, at 228 F. Supp. 340, the district court issued a temporary restraining order, and at 242 F. Supp. 14, a statutory three-judge court set aside the Commission's order, The Supreme Court, by its order of November 22, 1965, in *Seaboard Air Line R. Co. v. United States*, 382 U. S. 154, remanded the matter to the three-judge court for further review of the Commission's order. Argument before the three-judge court on remand was held February 24, 1966. By its order dated June 8, 1966, the three-judge court sustained the Commission's order approving the merger. The petition of PSI for leave to intervene in the court proceeding has been denied.

ences are not given in the brief to the portions of the record relied upon in support of various statements of fact made in the brief, as required under rule 1.91(d) of the Commission's General Rules of Practice. In reply Tam-Phos points out that the statements alluded to by the Railroads simply constitute argument in support of conclusions of law which Tam-Phos is advancing to the Commission, but Tam-Phos, nevertheless, furnished the specific record references in its reply. The statements objected to are, in fact, made in connection with argument in support of Tam-Phos's position, hereinafter discussed, that the Commission lacks jurisdiction in the Tam-Phos case. On the whole, Tam-Phos' brief is in substantial compliance with the rules of practice. The motion to strike is denied.

On brief, the Tampa Group presses its exceptions to certain rulings of the examiner at the hearings as a result of which certain portions of the oral and prepared testimony of witnesses offered by the Tampa Group were excluded from the record, and certain exhibits offered through these witnesses were rejected. These rulings, it is asserted, reflect an excessively and erroneously narrow view of the issues herein and the excluded evidence, it is urged, should be received. The testimony and exhibits alluded to were excluded on the basis of objections raised that such testimony and exhibits were cumulative, irrelevant, argumentative, not responsive, repetitious, or hearsay. No convincing reason is given why this material should now be received in evidence, and the motion of the Tampa Group is denied.

In its application and return to questionnaire, as an alternative to the authority sought in the Tam-Phos case, Tam-Phos prays that the application be dismissed for lack of jurisdiction in the Commission. Tam-Phos renewed its request for dismissal of the application on jurisdictional grounds by a motion filed November 1, 1965, to which the Railroads replied. The motion was denied by order of November 22, 1965, in which the Commission stated that this issue could "best be resolved after hearing. . . ." This issue was again raised by Tam-Phos at the hearing and it is pressed on brief. The Railroads oppose dismissal of the application on jurisdictional grounds.

The basis initially advanced by Tam-Phos for the proposition that the Commission lacks jurisdiction was that the proposed Tam-Phos line *in its entirety* would be an industrial track located wholly within one State within the meaning of section 1(22), and that it would not be operated as a part of a general steam railroad system of transportation.[6] On brief, Tam-Phos adheres to its position that the proposed construction is embraced within the exception set forth in section 1(22) and hence requires no authorization from the Commission. However, as its primary ground for dismissal of the application, Tam-Phos now advances the proposition that the Commission is without jurisdiction be-

---

[6]Section 1(22) provides: "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

cause the proposed Tam-Phos line would be operated in intrastate commerce only. A meaningful discussion and disposition of this jurisdictional issue requires an understanding of the physical characteristics of the line of railroad which Tam-Phos proposes to construct and of the nature of the operations which would be conducted over that line. These matters will be discussed later in this report. The jurisdictional issue, accordingly, will be disposed of later in this report.

General Background - Coast Line and Seaboard are major railroads, with their respective main lines extending in and through the States of Virginia, North and South Carolina, Georgia, Alabama, and Florida. The corporate and financial structure of these carriers are discussed in detail in *Atlantic Coast Line Railroad Company, et al, Purchase*, 261 I.C.C. 320, *Seaboard Air Line Ry. Co. Receivership*, 261 I.C.C. 689, and proceedings therein cited. General balance sheets for Coast Line as of June 30, 1965, and for Seaboard as of the same date, are shown in appendix A hereto. As mentioned hereinbefore, a merger of their lines has been approved by the Commission and sustained by the courts. The Railroads serve Florida over a network of lines, emanating principally from Jacksonville and extending southward as far as Naples, Boca Grande, Venice and Sarasota, on the west coast, and Miami and Homestead, on the east coast. Central Florida is criss-crossed by their lines, and is served by no other railroad.

Located in central Florida is one of the world's richest reserves of phosphate rock[7] Phosphate rock is manufactured into many products for industrial and agricultural uses, serving principally as a prime ingredient in the production of fertilizer. Although a substantial quantity of finely ground phosphate rock is applied directly to the soil, by far the greater part used for agricultural purposes is manufactured into superphosphate and triple superphosphate. Superphosphate is made by mixing phosphate rock with sulphuric acid, and triple superphosphate is made by mixing phosphate rock with phosphoric acid. Most of the producers of phosphate rock beneficiate the ore to a marketable product in washer plants adjacent to the mines, and some operate flotation plants for further recovery and upgrading of the ore. Many of the major producers themselves manufacture phosphatic fertilizers or elemental phosphorus in production complexes located near the mining operations.

Phosphate rock deposits are a conglomerate of pebble, sand and clay, usually found beneath an over-burden varying in depth from 5 to 40 feet. In central Florida the over-burden is stripped and the ore is mined by large, electric, dragline excavators equipped with buckets. The ore is slurried and pumped to the washing plant where it is processed and a fine slime discarded. The remaining wet rock is moved by rail in open-top

---

7"Phosphate rock" is a commercial term for rock containing one or more phosphate minerals, usually calcium phosphate, of sufficient grade and suitable composition to permit its use, either directly or after concentration, in the manufacture of commercial products.

hoper cars to the dryers or manufacturing complex in the mine field area. As later discussed, the dry rock and finished products move from these points either in all-rail movements to the interior United States, or by rail, and to a very limited extent by motor carrier, to the west coast of Florida for transshipment by vessel.

World production of phosphate rock in 1963 approached 50 million long tons, of which almost 20 million tons was originated in the United States. The major known reserves of marketable phosphate rock are in Africa and in the United States, the latter being located predominantly in Florida. Tennessee, and the far West. The reserves of phosphate rock in Florida are estimated by the Bureau of Mines of the Department of the Interior to exceed 2 billion long tons. This same source estimates that the annual demand for usable phosphate rock in the United States will climb to 12 million long tons by 1980, and that increased exports of this commodity may also be anticipated. Although about 60 percent of the known reserves are located in the Western States (Arkansas, Montana, Utah, Idaho, and Wyoming), that area produced only 14 percent of the total national output in 1963, while Florida produced 74 percent.

By far the principal source of phosphate rock in Florida is an area in central Florida referred to as the pebble rock district or bone valley.[8] This district is

[8]The term "bone valley" while perhaps conjuring up an image of prehistoric monsters long deceased, has a more prosaic reference to the bone phosphate of lime (P_2O_5) content of the

commonly acknowledged to embrace most of Polk County and adjacent portions of Hilsborough, Manatee and Hardee Counties. According to a metallurgical engineer long experienced in the prospecting for and development of phosphate rock land reserves in central Florida, substantial additional reserves, but of a lower grade, are present in an area extending southward from the afore-mentioned district into other portions of Manatee and Hardee Counties and into portions of Sarasota and DeSoto Counties. This witness testified, however, that for at least the next 25 years mining operations would continue in the pebble rock district and in the "gradational zone" between the district and the lower-grade fields south thereof.

Florida has been producing phosphate rock since 1888, and from the outset the Railroads have grown with the phosphate industry. Coast Line and Seaboard trackage in the phosphate producing area of central Florida aggregates a greater concentration of rail facilities and monetary investment for a single industry than may be found at any other single area on either road. Coast Line, for example, has 332 miles of track in the Pebble Rock District. In addition to providing

---

ore mined in this district. While other factors, such as the thickness of the overburden, must be considered, it is the bone phosphate of lime content of the ore which determines whether the mining of phosphate rock in a particular area is commercially feasible. Coast Line's industrial geologist indicated that phosphate rock, after beneficiation, with a bone phosphate of lime content of less than 30 percent, is not generally considered commercially mineable. He estimated that it would be several decades before the bone phosphate of lime content of the rock being mined in bone valley would fall below 70 percent.

the trackage necessary for handling the processing of the rock and the subsequent movement of the finished product from bone valley, both carriers have, as the phosphate industry has grown, continued to increase their ownership of locomotives and specialized equipment designed specifically for the movement of phosphate rock. Coast Line has almost $49 million invested in freight cars for handling phosphate rock. The cost of a single hopper car ranges from $12,000 to $26,000 depending upon the type and capacity of the equipment. As of October 1, 1965, Coast Line had over 600 locomotives and switch engines, and a car fleet in excess of 27,800 cars. Of the latter, 7,919 cars, or over 28 percent of its entire fleet, were cars designed for transporting phosphate rock and its derivatives. These included 1,964 open hopper cars used in hauling wet rock, 1,653 covered hopper cars, or port dumps used in hauling dry rock, and 4,302 covered hoppers, designed for hauling cement but suitable for and used in hauling phosphate rock to port when necessary to supplement Coast Line's fleet of port dumps. Seaboard has a total of 27,748 cars, exclusive of automobile rack equipment, of which 1,117 are open hoppers used in hauling wet rock, and 1,619 are port dumps. Seaboard also has 2,495 cement-type covered hoppers, of which up to 12 percent are regularly used to supplement the port dumps in hauling dry rock to port. A major difference between the cement-type hopper cars and the wet-rock cars and port dumps is that the latter are equipped with drop doors and the former with sliding-type doors.

The transportation of phosphate rock from bone valley represents a major source of traffic and revenue for both Railroads. In 1964, for example, Coast Line moved 7,998,307 tons of phosphate rock and derivatives yielding total revenues in excess of $24 million. Of this, 3,924, 419 tons, or 49.1 percent of this traffic, was moved to the west coast of Florida. The remainder, 4,072,888 tons, moved all-rail to interior points in the United States. This interior movement yielded 75.5 percent of Coast Line's total revenues from phosphate traffic. In the first 10 months of 1965, this interior movement aggregated 3,733,550 tons and yielded 77 percent of Coast Line's revenues from phosphate traffic. Seaboard in 1964 handled 9,256,699 tons of dry phosphate rock and super-phosphate, of which 5,005,988 tons, or 54.1 percent, moved to the west coast of Florida. Seaboard's dry phosphate rock and superphosphate traffic in 1964 yielded 14.2 percent of Seaboard's total revenues from carload traffic. Coast Line's revenues from phosphate rock in 1964 represented 10.07 percent of its total revenues. Its revenues from these commodities were exceeded only by its revenues from hauling fertilizer, which produced 10.525 percent of Coast Line's total revenues. Superphosphate in included in the fertilizer commodity group.

Of particular concern in these proceedings are the gathering services of the Railroads in bone valley and their services in moving phosphate rock and derivatives from the shipping points in bone valley to the ports on the west coast of Florida. From their lines in bone valley, the Railroads have built tracks and spurs to the points of connection with the tracks built

by the shippers to their property lines from their mines, washers, dryers, and chemical plants. At many locations in bone valley the Railroads maintain joint trackage over which one or the other supervises the movement of trains. Between Pierce and South Pierce, the Railroads operate over the line of the South Pierce Railroad, a 9-10 mile long private line owned by American Agricultural Chemical Division of Continental Oil Company (American). Seaboard also uses the South Pierce Railroad to reach American's mines at Palmetto and Payne Creek. Over their network of lines in bone valley the Railroads serve more than a dozen major shippers of phosphate rock. Witnesses for eight of these shippers supported the Piney Point application at the hearings herein.[9]

The "nerve center" of Coast Line's operations in the phosphate fields is its Lakeland-Winston yards. These are separate yards, about four miles apart but operated by the same crews. Coast Line operates a "coordinated" gathering service, in that all train movements in bone valley are controlled through radio by its dispatcher at Mulberry, Coast Line's central billing point. Lakeland-Winston is on Coast Line's Jacksonville-Tampa main line over which the phosphate rock moves to Coast Line's Uceta yards, on the outskirts

---

[9]American Cyanamid Company (Cyanamid), Smith Douglas Division of Borden Chemical Company (Borden), Armour Agricultural Chemical Company (Armour), Davison Chemical Company Division of W. R. Grace & Company (Davison), Swift & Company (Swift), V-C Chemical Company Division of Socony Mobil Oil Co., Inc., (V-C), Kerr-McGee Corporation (Kerr-McGee), and Olin Mathieson Chemical Corporation

of Tampa, thence west and south through Tampa to Port Tampa, Coast Line's terminal and ship-loading facility on Old Tampa Bay. East of Lakeland a spur runs north from the main line to Cyanmid's mine at Park, and from Lakeland a line runs south to Bartow where it connects with Coast Line's Naples Branch. The Naples Branch extends southward through Homeland, Fort Meade, Bowling Green, and beyond. From Winston, west of Lakeland on the main line, another line runs south and east through Tancrede, Prairie Junction, Mulberry and Tigerbay to a connection at Fort Meade with the Naples Branch. Spurs from this line connect with the South Pierce Railroad and reach a mine, washer, dryer, and beneficiating plant of International Minerals and Chemical Corporation (International) at Noralyn. Other spurs serve Swift's mine, washer, and dryer at Agricola, V-C's dryer at Nichols, Davison's mines at Bonnie Lake and its washer, dryer and superphosphate plant at Ridgewood, and International's mine, washer and dryer at Imrock. From Uceta yard, Coast Line's Sarasota Branch runs south roughly paralleling the coastline and serving International's dryer and shiploading facilities at Port Sutton, and a chemical-producing complex operated by U. S. Phosphoric Products Division of Tennessee Corp. at East Tampa. At Piney Point this line crosses the site of the lead-in track to the yard and shiploading facilities which are proposed to be constructed at Port Manatee.

Seaboard's concentration point for phosphate rock is at its yard at Mulberry, about midway on that carrier's line running west from Lake Wales through West Lake Wales, Bartow, Ridgewood, Mulberry, Nichols,

Edison, Welcome, Durant and Valrico to Yoeman's yard, near Tampa. From Yoemans yard the line runs west and south through Tampa and by trestle over Garrison Channel to Seaboard's terminal and shiploading facility on Seddon Island. At Welcome a line diverges north to Plant City and rejoins the main line at Valrico. A spur from that line serves Borden's production complex at Coronet. Seaboard's Boca Grande Branch, running north from that carrier's terminal and shiploading facility at Boca Grande, on the southwest coast of Florida, intersects the Piney Point line at Garwood and connects with the Lake Wales-Tampa line at Edison. From Durant Seaboard's Sarasota Branch runs south to Venice, about midway between Piney Point and Boca Grande, intersecting the Piney Point line at Willow, about 12 miles from Port Manatee. Other facilities served by Seaboard or Coast Line, or both, include American's complex at South Pierce and its mine at Boyette, Borden's mine, washer, and dryer at Tenoroc, Armour's mines at Armour and Hancock and its dryer at Rockland, V-C's mines at Clear Springs and Homine, Swift's mine at Watson, Cyanamid's mine at Sidney and Chicora and its dryer at Brewster, and International's chemical plant at Prairie Junction. There are interchange tracks at Bartow and Palmetto Junction over which the Railroads may transfer shipments destined to points local to the other road.

The rock destined to west coast Florida ports, herein called port rock, and the rock destined to interior points by all-rail movement, herein called interior rock, is gathered by Coast Line in trains which operate out of Lakeland-Winston daily into bone valley, placing emp-

ties, picking up loaded cars at set-off tracks at the mines and dryers, moving wet rock between mines, washers and dryers, and performing such other switching at the mines and plants as may be required. At Lakeland-Winston, which has 31 classification tracks and can accommodate an aggregate of 3,800 cars, trains are made up for the interior and for the port. Interior rock moves in box cars as well as in covered hoppers. From Lakeland-Winston to Uceta, 24 miles, port rock in covered hoppers and wet rock in open hoppers, as well as acids and other chemicals produced as an adjunct to phosphate production, move in trains averaging 150 cars. At Uceta the trains are broken up into trains of not more than 65 cars each for the 14-mile trip to Port Tampa. The capacity of Uceta is 2,200 cars, and trains are also made up here for Port Sutton and East Tampa. Trains to Port Sutton range from 75 to 125 cars in length. On the average, 10 turnaround trains operate daily out of Lakeland-Winston and 3 operate out of Uceta.

Seaboard's yard at Mulberry is its concentration point for loaded phosphate cars outbound to the port and to the interior, and for distributing empty cars among the various shipping points. Road switchers are used in the phosphate fields to haul wet rock from the mines and washers to the dryers, and to haul empty cars on return. In its gathering service Seaboard used these road switchers to pull cuts of loaded cars from the dryers and plants to junction points with the main line. Trains of port rock are made up right in the producing area, that is, loaded cars are picked up at successive junction points by regularly assigned trains un-

til up to 150 cars are accumulated. The trains then proceed to Yoemans yard when they are broken up into trains of 100 cars or less for movement to Seddon Island. Interior rock is separated from port rock in the producing area, and trains to the interior from Rockland, Agricola and Brewster are made up in the same fashion. Interior rock from other origins is brought to Mulberry where it is made up into trains for the interior.

Seaboard has been loading phosphate rock aboard vessels at its Seddon Island facility since 1908. The facility occupies a small portion of the 5 acres which Seaboard owns on the 218-acre island. Seaboard's yard on Seddon Island has a capacity of about 800 cars. Rock is hauled to Seddon Island by yard engines in cuts of up to 100 cars and is there classified as to parcel and grade and placed on approach tracks to the unloading hopper. The cars comprising the parcel of a particular shipper are switched and mixed pursuant to the instructions of the shipper in order that the different grades of rock may be blended to the specific grade desired, and unloaded from the cars into an under-the-track hopper for movement by conveyor belt to an unloading chute which pours the rock into the hold of the vessel. In this process, the loaded cars are weighed by track scales and samples of the rock going into the vessel are taken by an automatic sampling device. The Seaboard elevator can handle a maximum of 1,400 tons of rock an hour and is now being used to capacity. There are no facilities for ground storage of rock, and rock awaiting loading on vessel is stored in the cars. The elevator was modernized in 1947, and during the

past 5 years Seaboard has spend close to a half million dollars installing special dust-collecting equipment to capture or control the dust which is emitted when the rock is poured into the hold of a vessel. Because of dust, such finely ground products as defluorinated phosphate and triple superphosphate cannot be handled at Seddon Island. Such products, and a limited volume of phosphate rock, move to Seaboard's shiploading facility at Boca Grande. The latter facility is outmoded, however, and its effective use is curtailed by limited classification facilities.

Port Tampa, the terminal and shiploading facility operated by Coast Line, is owned by a subsidiary, Atlantic Land and Improvement Company (Atlantic). The elevator was built in 1921 as a steam-powered, bucket conveyor system with a vessel-loading capacity of 300 tons per hour. Alterations and improvements made in 1929, 1936, 1951 and 1960 resulted in belt conveyors, electric power, and a vessel-loading capacity of 1,400 tons per hour. In 1963 the structure was repaired and strengthened. The yard at Port Tampa has 36 tracks, the longest of which will hold 72 cars, and there is storage capacity in the yard to hold up to 700 loaded cars. Loaded cars arriving at Port Tampa are pushed across track scales by a switch engine. There is only one classification track beyond the scales, so classification at Port Tampa as to parcel and grade is performed at the storage tracks, an awkward procedure. Cars of different grades of rock are switched into an arranged sequence so that when a particular parcel is loaded on vessel a blend of a specified grade will be achieved. When the vessel is in berth ready

for cargo, 73 cars are placed on the approach track to the elevator, and 3 at a time they are pulled by an electric car pull over the receiving hoppers, the bottom doors are dropped, and the rock is dumped into the receiving hoppers. Car shakeouts and inspection assure that the cars are completely unloaded, and the empties are pushed off by the next 3 cars being pulled on to the receiving hoppers. The empties move to drop tracks where they accumulate until pulled away by switch engines to join trains for return movement to the mines. There is no ground storage of rock at Port Tampa, and no dust control equipment.

As previously indicated, many of the shippers of port rock are served by both of the Railroads, and the question of which carrier will haul the rock is determined by the selection of the shiploading facility at which the vessel will berth. This in turn depends upon the terms of sale of the rock, that is, whether the rock is sold at the mine or as delivered on board the vessel. In other words, the owner of the rock controls its movement. Another factor affecting the selection of the road over which rock will move is the "transit" rate. Much of the wet rock, as stated, moves by rail from mine and washer to dryer. The Railroads move the wet rock to the dryer at a very low transit rate, but for that low rate to apply the dry rock must be reshipped via the same carrier to port. This "captive" rock comprises a considerable portion of the port movement. The "feast or famine" situation which sometimes occurs at the port will also determine which facility will be used. If Port Tampa is congested with vessels waiting to be loaded in turn with rock, for example, and

Seddon Island is free to load a vessel, the loaded cars comprising a particular shipment which may be waiting in storage at Port Tampa can be moved back to Uceta, over an interchange track to Yoemans, and thence to Seddon Island where the vessel would be berthed. An official of Coast Line emphasized, however, that this is a "tortuously" difficult movement, not often made, and that the Railroads are, for the present at any rate, competing carriers, and do not make a practice of yielding their traffic one to the other solely because of any congestion which may exist at the shiploading facilities.

The Piney Point Line - The Piney Point line will come off the Naples Branch about 6 miles south of Fort Meade and about 1 mile north of Bowling Green, in Polk County. The turnout will have a power switch controlled from Tampa. From the turnout, the line will run southwest, crossing U. S. Highway 17 at grade about 2,000 feet beyond the turnout, and entering Hardee County about 3 miles beyond that. The line will then run west in a more or less straight line just south of Polk and Hillsborough Counties, successively crossing, at grade, State Roads 663, 37, and 39, U. S. Highways 301 and 41, and 15 other dirt roads. At the highways named the line will be equipped with automatic signalling devices and at the 15 other crossings with the standard crossbars. The line will cross and connect at grade with Seaboard's Boca Grande and Sarasota Branches, the crossings at Garwood and Willow to be protected by automatic interlock. The right-of-way will be 200 feet wide, over terrain which varies from gentle rolling hills on the east to flat pasture land

on the west. The service area bordering the line is sparsely populated and largely undeveloped, with no cities, towns or villages located within 2 miles on either side of the line. The roadbed will be 30 feet wide, with slopes of 2 feet horizontal to each foot vertical, and will be constructed with material to be obtained from borrow ditches within or immediately adjacent to the right-of-way. A single main track will be laid with 115-pound standard gauge rail on prestressed concrete crossties over crushed stone ballast. The maximum grade will be 0.58 percent and the maximum curvature will be 4 percent. There will be 3 pass tracks at 10-mile intervals along the line, each to be about 1.5 miles in length and to hold 150 cars. No new stations will be established, and no passenger service will be provided. The line will be constructed to handle heavy freight trains at a maximum safe operating speed of 60 miles per hour. The terminus of the line, as stated, will be at the yard and shiploading facility to be constructed at Port Manatee, just beyond the connection with Coast Line's Sarasota Branch, about three-quarters of a mile east of the present shore line on Tampa Bay.

There will be no joint operations over the Piney Point line. Coast Line and Seaboard will each run their own trains, using their own locomotives and crews. Pursuant to an agreement reached by the Railroads, one of the carriers will have the responsibility of controlling operations and dispatching on the line, with the other having the right to alternate such control after two years. Maintenance of the fixed facilities on the line would be joint, however, with the cost divided between

the carriers on the basis of gross ton-miles of traffic handled. Both carriers will be responsible for returning empty cars to bone valley, but it has not yet been determined whether the handling of empties will be included in the gross ton-mile cost formula. Coast Line's trains engaged in the gathering service of port rock in bone valley will bring the loaded cars to new setoff tracks proposed to be constructed near Fort Meade. These cars will be moved in fast trains averaging 150 cars directly to Port Manatee with no classification or switching except at the port. Where possible, solid trainloads would continue to be made up at Mulberry or Pierce, or at the shipping point of any producer capable of furnishing sufficient rock, and moved directly via the Fort Meade turnout to Port Manatee. On the Seaboard, trains would be made up at Mulberry and at shipping points where sufficient volume is accumulated, and brought on to the Piney Point line at Garwood or Willow for direct movement to Port Manatee. Each carrier would operate a minimum of one regularly assigned train daily, with extra trains as needed, all movements being under the control of a single dispatcher at Mulberry or Tampa. With the elimination of intermediate yard switching, the Railroads hope to achieve the equivalent of "unitized train" operation between Fort Meade and Port Manatee. As common carriers, however, the Railroads would handle, in addition to port rock, any other traffic that is tendered for movement on the line.

With the completion of construction of the Piney Point line and of the rock-handling facilities proposed at Port Manatee, the Railroads propose to divert to

Port Manatee via the Piney Point line all of the phosphate rock, superphosphate, triple superphosphate, and other phosphate derivatives now being moved through Port Tampa and Seddon Island. The movement of interior rock would not be affected, nor would the movement of rock and other products to Port Sutton and East Tampa. Shipments of rock specifically routed by the shippers through Port Tampa and Seddon Island would continue to be handled through those facilities. Also, rock now moving through Boca Grande would continue to so move. It is the expectation of the Railroads, however, that following the approval and consummation of this proposal, the great bulk of the port rock movement would move over the Piney Point line to Port Manatee for transshipment beyond by vessel. Other traffic now moving through Tampa would continue to move through Tampa, and the Railroads would continue to provide the necessary trains and services to handle this traffic.

It is the position of the Railroads that the proposed construction of the Piney Point line and rock-handling facilities at Port Manatee, and the diversion of the port rock movement over that line and to that port, are impelled by (a) increasing production of phosphate rock in central Florida, (b) inadequacy and obsolescence of the existing rock-handling and shiploading facilities at Tampa, and (c) operational impediments and disadvantages inherent in moving phosphate rock through and loading vessels in the City of Tampa. In view of the importance to the Seaboard and Coast Line of their port rock movement, added urgency is given to their proposal, it is alleged, by increasing compe-

tition in the world phosphate market from other producing areas, both foreign and domestic.

Appendix B hereto, taken from an exhibit of record, shows the general location of the Piney Point line as proposed.

Tampa - Tampa Harbor, located midway on the west coast of Florida, is said to be the largest protected harbor in Florida. With the exception of Boca Grande, it is the only deep-water port on the west coast of the Florida Peninsula. Tampa Bay extends about 21 miles from the Gulf of Mexico to the Interbay Peninsula where it branches to form Hillsborough Bay on the east and Old Tampa Bay on the west. The Hillsborough River, which flows through the city of Tampa, enters Hillsborough Bay at its northern extremity. From Egmont Bar at the Gulf, the ship channel extends a distance of about 20 miles to where it branches into Port Tampa channel serving Old Tampa Bay, and Hillsborough channel serving Hillsborough Bay. At about mile 34, Hillsborough channel branches into Seddon and Sparkman channels which are joined north of Seddon Island by Garrison channel. Ybor channel extends northward from the intersection of Sparkman and Garrison channels. The depth of the ship channel varies from 36 feet at Egmont to 34 feet at Sparkman and 30 feet at Seddon. The Alfia River and Port Sutton channels connect with Hillsborough channel at about mile 28 and mile 32, respectively. The areas surrounding the upper harbor channels comprise the Tampa port complex, with numerous mercantile and industrial facilities located along the waterfront. Commencing in

1880, numerous improvements have been made from time to time in Tampa harbor. Currently, in terms of tonnage handled, it is the largest port in the Southeast between Norfolk, Va., and Mobile, Ala.

Tampa has a population of over 300,000 persons, and it is the principal focal point of an 18-county trade area with an aggregate population in excess of 1.6 million. The Tampa area is the center of numerous commercial and industrial activities with over 875 manufacturing plants producing a wide variety of products. Ocean-going and coastal commerce moving through Tampa in 1964 aggregated more than 17.8 million tons, of which 41.2 percent, or more than 7.3 million tons, consisted of phosphate rock and allied products. Other large commodity groups handled included petroleum products (4.4 million tons), sulfur (1.5 million tons), and coal (892,000 tons). Phosphate rock constituted 86.7 percent of all outbound tonnage. To move the phosphate rock brought into Tampa by the Railroads in 1964, 928 ships and barges called at Port Tampa and Seddon Island and loaded 6.8 million tons of rock. The inbound traffic consisted largely of bulk commodities more than half of which was petroleum and petroleum products moving from Gulf ports. There were also large inbound movements of sulfur, coal, cement, and grain, by barge as well as by ship.

Tampa, the northern portion of Hillsborough County, upper Tampa harbor, and the Tampa ship channel to the sea comprise the Hillsborough County Port District. The District is governed by the Tampa Port Authority, a corporation created by a special act of the Florida

legislature and charged with administering the Port of Tampa, and with the long-range development and utilization of the harbor facilities. Included within the jurisdiction of the Port Authority are Port Tampa, Seddon Island, and Tampa Terminals, Inc., located on Port Tampa channel, Seddon channel, and Ybor channel, respectively. Tampa Terminals is a motor carrier terminal equipped with storage silos and ship-loading facilities for the handling of phosphate rock. The volume of rock handled through Tampa Terminals in 1964 exceeded 415,000 tons. Port Sutton and East Tampa are located just south of the jurisdictional limits of the Port Authority. The jurisdiction of the Port Authority does extend, however, to a tract of land on the shore of Hillsborough Bay immediately north of Port Sutton, owned by Atlantic, herein sometimes referred to as Black Point.

Port Tampa has a single slip 268 feet wide at the elevator and 34 feet deep at mean low tide. The main elevator structure consist of a light structural steel framework supporting the conveyor, housing, and loading chutes which extend 428 feet along the slip at a height of about 80 feet. There are 11 fixed outlets along the conveyor at which three traveling chutes may be placed to pour rock. The chutes extend only 36 feet outward and even with 6-foot aluminum extensions cannot load vessels wider than 82 feet. Also, the chutes are fixed at 38 feet above low water and vessels with hatch openings more than 35 feet above water have to ballast before they can be loaded. While loading cargo, a vessel may have to shift position 12 to 14 times in order to keep trim. Loading cargo is trimmed by

men with shovels, or small bulldozers. The loading capacity of the elevator has long been stretched to its limits, and the entire structure is in poor condition. It stands only a few feet back from the fender line, and has been struck by ships many times. It has been damaged by weather and corrosive materials, and sags noticeably due to overloading. The mechanical and electrical equipment is obsolete, and replacements parts are difficult to obtain. Despite extensive repairs made in 1963, the structure cannot be expected to be kept in operation for more than 2 or 3 more years.

Although under optimum conditions Port Tampa can load 20,000 tons of rock per day aboard vessels, the average daily volume loaded in 1964 was 10,775 tons. Due to such uncertainties as the weather and delayed ship arrivals, Port Tampa is often unable to keep abreast of its ship-loading schedule and as a result ships accumulate in the harbor and are forced to wait their turn to be loaded. During the first 3 months of 1964, for example, 146 vessels calling at Port Tampa had to wait at anchor an average of 32 hours each to be serviced. The inadequacy and obsolescence of the rock handling facilities at Port Tampa have created a severe car shortage. Despite an average detention time at Port Tampa in 1964 of only 4.7 days for cars loaded with rock, Coast Line had an average daily deficit in 1964 of 144 empty cars under the number of empties ordered for placement by shippers.

Coast Line reaches Port Tampa over its main line which runs through the heart of downtown Tampa, traversing numerous main thorofares. Ordinances of the

city of Tampa restrict the Coast Line's operations through a 14-mile area of the city along which there are 48 highways crossing at grade. Coast Line is permitted to operate through this area only during specified hours of the day, with trains not to exceed 65 cars in length exclusive of engines and cabooses, moving at a speed not to exceed 20 m.p.h. Seaboard's lines to Seddon Island also run through the streets of Tampa, crossing a number of busy thorofares, but skirting downtown Tampa. As they affect Seaboard, the ordinances permit the operation of trains of up to 100 cars exclusive of engines and cabooses, moving at speeds of up to 20 miles per hour. Seaboard's operations are also subject to weight restrictions governing the use of the trestle over which its lines cross Garrison channel to Seddon Island. The Railroads contend that these various restrictions seriously hamper their operations to and from their terminals in Tampa.

Seaboard's terminal on Seddon Island, like Coast Line's at Port Tampa, was not built to handle the growing volume of traffic which it is now called upon to handle. Situated along Seddon channel, the shiploading facility faces adjacent Davis Island on which there are located residential communities as well as industrial sites. For a number of years the residents of Davis Island have complained that clouds of dust emitted on Seddon Island during shiploading operations have polluted the air and damaged their property. In 1962, the Chief Boiler Inspector of Tampa, who exercises the City's jurisdiction over air pollution, issued a citation against Seaboard with regard to the dust problem. Hearings were held, after which Seaboard took steps

to acquire and install dust control equipment. Complaints from residents of Davis Island are still received, according to this official, but in his opinion the dust control equipment now in use is adequate to control the dust, such problems as still exist being attributable to occasional improper operation of the equipment. He conceded, however, that even with the use of this equipment it is impossible to control the dust when certain products, such as defluourinated phosphate, are being poured into a vessel.

The traffic and engineering officials of Coast Line and Seaboard are in agreement that their respective facilities at Port Tampa and Seddon Island are inadequate and obsolete, and have been so for some years. A feasibility study was made by officials of Seaboard to determine whether an upgrading of Seddon Island facilities is warranted, there being available for expansion sufficient land on Seddon Island owned by Seaboard. It was concluded that the expenditure of funds for such purpose is not feasible in the light of the operating difficulties connected with moving traffic through the City of Tampa and the dust problem at Seddon Island. Coast Line and its affiliate, Atlantic, had made efforts since January 1965 to obtain authority from the Port Authority to fill in submerged lands at Port Tampa to produce 90 additional acres of uplands for the purpose of erecting, among other things, additional phosphate handling facilities at Port Tampa. Coast Line had planned to expend some $3.25 million for dredging and for construction of an elevator and access tracks. Coast Line's application to the Port Authority was never approved. In June, 1965, this applica-

tion, insofar as it sought title to the uplands proposed to be created for the purpose of constructing a phosphate elevator, was modified to show that such lands would be used for general industrial and commercial purposes, something in the nature of an industrial park. By early 1965, however, the concept of a joint Coast Line-Seaboard terminal and rock-handling facility at Port Manatee had begun to take shape. Before this project arose, much consideration had been given by Coast Line and others to a plan to construct and operate a terminal and rock-handling facility at Atlantic's Black Point site.

Black Point - In September, 1958, Coast Line and Atlantic filed an application with the Port Authority for authority to fill in a substantial acreage of submerged land abutting the Black Point tract for the purpose of constructing an up-to-date rock-handling facility with supporting rail yards and trackage. It was contemplated by Coast Line that Seaboard would participate in this venture and that there would be joint operation of these facilities. The development of Black Point was among those projects then being considered in a general study of the harbor area made for the Port Authority by a consultant engineering firm which culminated in the issuance, in August 1959, of the so-called Praeger report. Among the conclusions reached in this report was that the filling in of the submerged lands adjacent to Black Point is desirable and necessary for the development and utilization of the harbor. Nevertheless, Coast Line's Black Point application was never approved. According to Port Authority officials, the application was deficient in certain material respects. An-

other engineering firm was later retained by the Port Authority to prepare an economic feasibility study of the harbor area, that is, to determine what need be done to enable the Port of Tampa to function at maximum efficiency. However, the major purpose of the study was to develop facts on the basis of which Federal authorization and funds might be obtained to deepen the channels in the harbor. The so called Reynolds report, issued in June 1965, recommended that the channels be deepened to a depth of 40 feet.

In May, 1965, in view of the projected move of the Railroads to Port Manatee, the Port Authority requested these latter consultants to make a preliminary study as to the feasibility of constructing rock-handling facilities in the East Hillsborough Bay area. A study was made, including examination or core borings in the submerged land area, and a preliminary report was made to the Port Authority indicating that the Black Point area is the "most promising site" for such a facility, in that, among other things, it would tend to concentrate shipping in a small area conveniently located with respect to other shipping terminals, it would eliminate the nuisance of trains passing through the heart of Tampa, and it would eliminate the dust and noise problem in the vicinity of Seddon Island. No consideration was given, however, to such aspects as the adaptability of the site to the operation of classification yards, and the feasibility of the site with relation to the gathering service in the phosphate fields

The Black Point site, including 250 acres of submerged lands proposed to be filled in, would aggregate about 430 acres. Among its advantages for the purposes here involved, are that it is located closer to the pebble rock district and to the ship channels than is Piney Point, and that it is located only several hundred feet from Coast Line's Sarasota Branch. Coast Line officials found, however, that due to the shape of the site and the fact that Coast Line's lines encircled the perimeter of the site, it would be difficult to get trains in and out of the site and tortuous and inefficient track arrangements would be required in laying out the classification yards and access tracks. The Railroads ultimately concluded that the site would not be feasible for their purposes.

Subsequent to the commencement of the hearing herein, the Port Authority instituted an action, now pending before the Florida court, to condemn the Black Point site under the Port Authority's power of eminent domain, for the purpose of acquiring the property for the construction of railway, loading and terminal facilities in furtherance of port development in the public interest. By a letter to the Port Authority, dated December 5, 1965, Coast Line's president reaffirmed the carrier's commitment to the Piney Point-Port Manatee project, but stated:

> However, we have no desire to put the Port Authority to the expense of litigating the condemnation issue. We prefer to be cooperative. If you wish we will sell you this property at a negotiated or appraised price or negotiate a

long-term lease on a reasonable basis if you, in turn, will agree to go forward with the construction and permit us to operate the facility.

Coast Line offered to serve any phosphate facility constructed at Black Point, in conjunction with Seaboard, and to treat it, both service-wise and rate-wise, on a parity with the facilities to be constructed at Port Manatee. Coast Line's offer is presently under consideration by the Port Authority.

Port Manatee - Coast Line officials were approached at Jacksonville in February 1965, by the Manatee County Commissioners and were asked if Coast Line was interested in establishing marine phosphate facilities near Piney Point.

The Commissioners were told of the then-pending Coast Line application to improve Port Tampa, but Coast Line indicated that it would give consideration to any concrete proposal by Manatee. Shortly thereafter, the Manatee officials returned with a detailed proposal that Coast Line, and now Seaboard, found practical and feasible. It was agreed that Manatee would construct, on designated acreage in the port area, a phosphate terminal with necessary appurtenances, including slip, entrance channels, and railroad yards, all subject to the approval of Coast Line and Seaboard engineers, the facility to be leased to the Railroads on a long-term basis. In the fall of 1965, meetings were held by Railroad officials with major phosphate shippers, to sound them out as to whether they would ship over the Piney Point line to Port Manatee, and to obtain estimates

of the volume of rock which the Railroads would be tendered during the ensuing year. Finally on November 1, 1965, a lease agreement was executed by and between the Manatee County Port Authority, Coast Line and Seaboard.

Under the lease Manatee[10] undertook, among other things, to acquire the necessary land and to construct thereon facilities for the receipt and delivery into vessels of phosphate rock and allied products, including all necessary, appurtenant and incidental facilities as described in the agreement. The site of approximately 400 acres and the engineering specifications of the facilities are described in appendices to the agreement. The cost of the site and facilities to be leased is estimated in the agreement to aggregate $11,440,669. The Railroads agreed to lease the facility for an initial term of 40 years, with options to renew for additional 20-year periods, at an annual rental of $749,440. The agreed rental contains a factor based on a percentage of the cost of dredging the main channel to Port Manatee. Other provisions of the lease describe the proposed financing of the entire port facility, which would occupy some 1,500 acres including the 400-acre phosphate terminal, and delineate the various rights and obligations of the parties. Manatee has the right to terminate the lease if it is unable to finance the acquisition and construction costs, and the Rail-

[10]The Manatee County Port Authority, created in 1963 pursuant to Florida statute, under Florida law is composed of the same individuals who compose the Board of County Commissioners of Manatee County, the governing body of the County.

roads have the right to terminate if, within 24 months, (a) Manatee fails to finance their costs, fails to obtain authorization to dredge the main channel, fails to commence dredging, and fails to commence construction, and (b) the Railroads fail to obtain final authority to construct their Piney Point line. In addition, the Railroads have the right to approve the terms of sale of certain bonds with which Manatee proposes to finance the construction of the phosphate facility, and the Railroads may cancel the lease if they "in good faith fail to approve the terms of the sale of such bonds."

Manatee had retained a firm of industrial and transportation consultants in June 1965 to determine whether there was a need for public marine facilities at Port Manatee, and if such a need existed, to study the Port Manatee site, assemble and evaluate data, determine the economic feasibility of such a facility at that site, and prepare appropriate plans for such a facility. The consultants found a need for marine facilities to exist, based in part on the County's need to strengthen its economic base by stimulating commercial and industrial activities. A need for construction of the Piney Point line was found, based on the need of Manatee County to supplement its available rail service, now basically north-south, with east-west service to conform to the major flow of the traffic which moves from the interior to the Gulf. The consultants found the Port Manatee site appropriate and feasible for the construction of marine facilities, and plans were drawn accordingly. The master plan shows, in addition to the proposed railroad facilities, slips, berths, storage and cargo areas, and sites for basic industries. It was empha-

sized that Port Manatee would be by no means a joint enterprise insofar as the Railroads are concerned, that their participation in this project would be solely as tenants, and that a general purpose port would be constructed at Port Manatee regardless of the outcome of the instant proceeding.

The site at Port Manatee is described by a Coast Line engineer as "superior to any other location within reasonable range of the phosphate territory." Construction at Port Manatee has not as yet commenced. A shipper witness who visited the site in October 1965 described it as completely virgin territory, inhabited only by snakes, crocodiles, and alligators. The Coast Line engineer estimated that construction of the phosphate facility, as described in the lease agreement, would take about 14 months. However, dredging to provide the necessary uplands has not yet been started, nor have detailed plans been drawn for the foundation. The facility planned is essentially the same facility previously planned to be constructed at Port Tampa. There are proposed two elevators to be located well away from the fender line, each with a traveling gantry equippped with a rotating telescopic chute and a deflecting spoon trimmer. The gantry will operate a distance of 600 feet, with a reach of 66 feet, and will be able to load vessels up to 50 feet above mean low water. Vessels will receive a seaworthy trim without use of men and shovels. Each elevator will have a loading capacity of 2,800 tons per hour. Weighing the rock will be by belt scales at the elevators, and there will be lighting facilities to permit round-the-clock operations. Each elevator will have a 150-car capacity feed track,

and a 150-car capacity empty track. Supporting the elevator will be a modern hump yard with a capacity of 3,000 cars. There are planned 3 receiving tracks, and 4 departure tracks, each with a capacity of 150 cars, 16 classification tracks with an aggregate capacity of 400 cars, and 13 storage tracks with an aggregate capacity of 800 cars. As designed, the yard will be able to receive and dispatch trains of up to 150 cars.

Under the agreement between Coast Line and Seaboard, previously referred to, there will be joint operation of the yard and terminal under the supervision of a designated official of one of the carriers. In the contemplated operations at Port Manatee trains coming from the phosphate fields would move into one of the three receiving tracks, and the road engine would move to the departure track to pick up empties for the return trip to the fields. The loaded cars would be humped from the rear by a switch engine to the classification tracks where the cars would be classified as to ownership and grade. They would be pulled by a trimmer engine in cuts of up to 30 cars into the tail track and then pushed to the storage track. If a vessel is available for loading, the cars would by-pass the storage track and go directly to the feed track. From the storage track, the waiting cars would be pulled by the hump engine to the feed track. The cars would reach the feed track in pre-determined order for blending, and would be dumped into the hopper. The empty cars would be pushed by succeeding cars into a kickback and then down to the empty track

where they would be picked up by switch engines for the departure track.

There will be land available at Port Manatee for ground storage of phosphate rock, but the Railroads are still studying the question of whether ground or silo storage will be utilized. The phosphate slip at Port Manatee will be about 350 feet wide and more than 1,800 feet long, with a planned depth of 40 feet. The slip will be about 3 miles from the main ship channel, and about 20 miles from the Gulf. As of December 6, 1965, no application had been filed with the Corps of Engineers for authority to cut a connecting channel to the main harbor channel. The project would have to be considered, as well, by various State agencies having an interest in the Florida waterways, and a public hearing in the matter may be required. Also, the Tampa Port Authority claims jurisdiction over the harbor channel, as stated, and Manatee may have to obtain its approval before cutting a connecting channel. An engineer testifying for the Tampa Group estimated that the cost of cutting such a channel may run upwards of a half-million dollars per mile.

Shipper Support, Piney Point Line - Cyanamid, Borden, V-C, Armour, Swift, and Davison, as here pertinent, are major producers of phosphate rock in bone valley. Kerr-McGee is a purchaser of rock completing plans to mine rock in quantity in bone valley, commencing in October, 1966, and Olin is a major purchaser of phosphate rock. As previously indicated, the overall movement of port rock is controlled not be the Rail-

roads but by the shippers or owners of the rock, depending upon the terms of sale of the rock. The rail movement of port rock in generally controlled by the shipper, who selects the rail carrier and the port. This selection is largely governed by the location of the shipping points, transit arrangements, and the state of congestion at the respective ports. The fact that a particular shipping point is local to the line of one carrier, however, does not necessarily limit the shipper to use of that carrier. V-C, for example, who's mines are local to Seaboard, has an agreement with Coast Line and Seaboard whereby, on alternate months, Coast Line is permitted to move wet rock over Seaboard's line to V-C's dryer at Nichols, which is served by both carriers on traffic to the port.

Although several shippers own cars which may be used in emergency situations, the shippers are dependent upon the Railroads for cars to haul the port rock in order to meet customer commitments, and to keep their mines, dryers, and plants in operation. The busy season for the movement of rock extends from September through April, and there is an almost constant shortage of available cars, attributable in part to congestion at the port. When the elevators are unable to maintain ship-loading schedules, substantial car and vessel demurrage charges are incurred and additional expenses are incurred in the fields. V-C, for example, is forced to operate its dryers on a 7-day week and to pay overtime in order to maintain production during periods of car-shortage attributable to cars being held under load at the port. The support of these shippers is predicated in large part on representations made

to them by the Railroads that construction and operation of the Piney Point line would result in improved transit time, and in increased car utilization through faster turn-around time. Manifestly, such improvements in service are dependent, in turn, upon the availability of improved phosphate facilities at Port Manatee. Almost uniformally, the shipper witnesses expressed dissatisfaction with the existing rock-handling facilities at Tampa and several indicated that the proposed new facilities at Port Tampa and Black Point would have been satisfactory. As stated by Davison's witness, it doesn't make any difference where the Railroads take the rock so long as the shipper receives expedited handling. Olin's witness put it this way: "We want an improved port, primarily. The railroad line is part of that improvement. And, therefore, we support . . . the new railroad line as well."

As later discussed, all of the supporting shippers, except Kerr-McGee and Olin, gave the Railroads estimates of the port rock that will be available for movement by rail. It was emphasized that they have made no "commitment" to the Railroads with respect to traffic, but that this traffic would be tendered to the Railroads and it was supposed that it would move over the Piney Point line to Port Manatee if that line and port facility are, in fact, constructed and placed in operation. Cyanamid moves wet rock by rail from its mines at Sidney, Park and Chicora to its dryer at Brewster and from Brewster in 1965, it moved 1.4 million tons of port rock via Port Tampa, Seddon Island, and Boca Grande. Borden does not compete in the export market but ships 180,000 tons of rock a year by motor

carrier from its dryer at Tenoroc to Tampa Terminals for domestic consumption. V-C shipped more than 1 million tons of port rock in 1964, and its interior-rock movement aggregated more than 1.3 million tons. As agent for Olin, it ships 200,000 tons a year by motor carrier to Tampa Terminals. Armour's wet rock move by rail to its dryers at Armour and Rockland. About half of its production is interior rock. Much of its rock is "captive" to Seaboard. Swift ships 500,000 tons a year from its dryer at Agricola, most of it "free" rock. It is not unusual for Swift to ship 50 to 100 70-ton cars of rock in a single order. Davison shipped 883,000 tons of port rock in 1964 and a much greater volume of interior rock. About 60 percent of its port rock is "free" and the remainder is "captive" to Coast Line. Some of its production moves by motor carrier to Tampa Terminals, but 95 percent of its port rock moves by rail through Port Tampa. Kerr-McGee expects to produce 1.5 million tons of rock a year at Brewster, about half of which would be port rock.

Some shippers support the application for additional reasons. Olin, for example, purchases 800,000 tons of rock a year from American and Cyanamid which now moves by motor carrier to Tampa Terminals. The rock is transported by Olin's barges to Houston, Tex., and Joliet, Ill. for use in manufacturing chemicals and fertilizers. Port Manatee, being closer to the Gulf, Olin expects to realize savings from a quicker turnaround on its barges. Borden has a chemical complex under construction at Port Manatee. The complex will receive rock from Borden's dryer at Tenoroc and other products from a plant under construction at Geismar,

La. The complex will produce sulphuric acid and other products for movement to the interior. Borden expects that the Piney Point line will expedite movement to and from the Port Manatee complex. Several shippers indicate, also, that they have reserve phosphate lands readily accessible to the proposed Piney Point line.

The Piney Point application is supported, of course, by Manatee, which stands to gain materially from the volume of commercial activity which would be diverted by the Railroads to Port Manatee. Manatee has already taken an option of 356 acres of land at the Port Manatee site, the acquisition of which will cost in excess of $300,000, and is negotiating with other land owners for the acquisition of additional acreage. A $750,000 bond issue by Manatee for acquisition and construction costs, has been validated,[11] but no bonds have as yet been issued. Manatee proposes to validate a $2.7 million bond issue to finance construction of a water-supply system to Port Manatee, and a $18.5 million bond issue to finance construction and development of Port Manatee. These proposed bond issues have not as yet been submitted to the court for approval, nor has any agreement been reached with the State authorities for payment by Manatee for additional uplands which are planned to be created.

Cost of Construction, Piney Point Line - The Rail-

[11]The circuit Court of Manatee County has issued a decree validating this issue. On appeal by the State, the Supreme Court of Florida, in *State v. Manatee County Port Authority*, 171 So. 2d 169, dated January 20, 1965, refused to set aside the decree of the lower court.

roads' estimate of the cost of constructing the Piney Point line is shown in appendix C hereto. The costs shown do not include the cost of constructing set-off tracks at the eastern terminus of the line, previously referred to, nor do they include the cost of constructing trackage and yard facilities at Port Manatee. The latter costs, as indicated, will be borne by Manatee, although the track and yard layout has been designed by Coast Line's engineers and will be constructed subject to the approval of the Railroads.

As seen, the total estimated cost of constructing the line, including passing tracks, would aggregate 7.67 million. However, this cost is predicated upon the line crossing all highways at grade. The matter of railroad crossings in Florida is under the jurisdiction of the State Road Board, a 5-man body created by act of the Florida legislature. According to Vincent Nucio, the Board member from District No. 1, which embraces the Piney Point area, the State Road Board is governed by no statutory policy with regard to grade separations at rail crossings, and the Board itself follows no hard and fast rule. It has been dealing with each crossing situation as it arose, making traffic counts and safety studies, and deciding each individual situation on its merits. A general policy is in the process of being formulated, however, which would require (a) that no major highway crossed by a railroad would be blocked for more than 5 minutes at any one time, (b) that there would be no railroad switching within the highway right-of-way, and (c) that if warranted by the volume of traffic, the railroads would be required to construct

a grade separation, either within a specified time or at the discretion of the highway engineers.

The Piney Point line, as stated, would cross several Federal highways, including U. S. Highway 41 at the threshold of the Port Manatee project. U. S. Highway 41 has been improved to four lanes from Tampa south to the Hillsborough County line. The State Road Board has had occasion to make a traffic and safety study of U. S. Highway 41 in the area of Piney Point in connection with a railroad request for authority to cross the highway in order to serve the Borden complex now under construction at Port Manatee. The Board is considering approval of the Borden crossing subject to the general policy above referred to, with the understanding that if U. S. Highway 41 is widened in the Piney Point area the railroad would be required to construct a grade separation. At Port Sutton to the north, on the other hand, the railroad was permitted to cross U. S. Highway 41 at grade.

The Railroads have not as yet applied to the State Road Board for authority to cross the highways, but Railroad officials believe that the Railroads will be permitted to cross at grade. However, in the event that a grade separation is required at U. S. Highway 41, an estimate of the cost of constructing such grade separation has been prepared, which would increase the total construction costs by $461,000 to $8.131 million. If other highways are also required to be crossed by underpass or overpass, the total cost would be increased in proportion.

The Railroads have not as yet commenced the acquisition of the right-of-way. An expert appraiser was retained by the Railroads in September 1965 to estimate the cost of acquiring the necessary land for the right-of-way. After on-the-ground inspection of the land, classification of the land into categories for value purposes and comparison with recent sales in the area, the appraiser reported that some 1,200 acres would have to be acquired with an aggregate value of $700,000. He estimated the acquisition cost, after allowing for severance damages, to be $1.2 million. The estimate does not include any allowance for attorneys' fees, appraisal fees, or rising values. The appraiser emphasized that his report, completed in only three days, was not an appraisal but was what he termed "a planning report", and that he "would not be caught dead in court" using this report to establish the market value of the land. In appendix C the Railroads allow $1.5 million for land acquisition, the difference to act as a cushion.

The Railroads estimate that construction of the line can be completed in twelve months. The construction would be financed from funds currently available to the Railroads, and no loans, grants, or other donations will be involved. The Railroad's estimate of construction costs does not include any element of cost representing the value of the funds which the Railroads will devote to this project. The Railroads contend that this joint venture will be profitable, and that the Piney Point line will yield a return on added investment of 23 percent, which would enable the Railroads to recover the cost of constructing the line in slightly more than four years.

Estimated Revenues and Expenses, Piney Point Line
Shown in appendix D hereto is the Railroads' estimate of the volume of traffic expected to move over the Piney Point line during the first five years of operation thereof, and the gross revenues expected to be derived from this traffic. The tonnages indicated for the first year are based for the most part on forecasts made by eight leading shippers of rock[12] as to their projected port rock traffic in 1966. Included, also, is a volume of traffic for American, which did not furnish an estimate to the Railroads, and a volume of traffic handled by Borden for the account of other producers. In the latter two instances, the volume of traffic expected to be handled is based on the actual volume of traffic handled for these shipppers during a 5-year period ended in 1965. On the basis of the proportion of the total traffic handled for each of the nine shippers during the 5-year period to Port Tampa and Seddon Island as against the proportion handled to Boca Grande, the projections and estimates were separated into volumes to be handled through Port Manatee in lieu of the Tampa ports, as shown in appendix D, and the volumes to continue to be handled through Boca Grande. The revenues shown for the estimated first-year traffic are based on a mean length of haul of 60 miles over both lines and in-vessel rates of $1.15 per net ton for phosphate rock and superphosphate, and $2.06 per net ton for defluorinated phosphate, the same as are presently published to the Tampa ports and Boca Grande. The totals reached for the first year's operations were in-

[12]Cyanamid, Armour, Davison, Borden, Swift, V-C, Central Phosphates, Inc., and Consumers Cooperative Association.

creased 5 percent for each succeeding year to reflect applicant's best estimate of the increased tonnage which may be anticipated in the light of present knowledge of the industry's potential.

It must be noted that in introducing the estimates or projections purporting to represent the volume to traffic expected to be handled for each of the nine shippers, the Railroads so arranged the data that none of the traffic volumes shown could be identified with any specific shipper. The rail distances from the nine shipping points to the port via the Piney Point line were shown, but these too were so arranged that the identity of the shipper was concealed, it being pointed out that given distances, a competitor could identify the company with its traffic projection. This procedure was followed pursuant to instructions from the shippers that disclosures of their respective traffic projections would be detrimental to their interests. Under section 12(11) of the act, it was alleged, it would have been unlawful for the Railroads to disclose this information without the shippers' consent. During the course of the hearings, however, witnesses for the shippers examined the traffic projections, and each indicated that he recognized therein a projection which had been made by his company.

The tonnages and revenues shown in appendix D were separated as between Coast Line and Seaboard based upon the extent to which each carrier serves the individual shippers, and it was indicated that for the first year of operation Coast Line would handle a total volume of 2,700,923 net tons, for a gross revenue of $3,441,641, and Seaboard would handle 2,688,754 net tons, for a gross revenue of $3,426,392. The subsequent years, as stated, would merely reflect successive in-

creases of 5 percent. Each of the carriers developed its cost of handling its portion of the projected traffic and estimated its net railway operating income, before provision for income taxes, from handling the traffic. The date developed for the first year of operation is shown in appendix E hereto.

Railway operating expenses on the proposed line were developed separately from expenses beyond the line. On-the-line expenses developed as direct expenses included maintenance of equipment, maintenance of ways of structures, and transportation, and these were computed by utilizing system average unit costs in connection with operating data furnished by operating witnesses. Indirect expenses and functional overheads were developed by applying system ratios to the direct expenses. Yard expenses at Port Manatee were obtained by assessing unit costs and wage rates to the operation and maintenance requirements specified by the Railroads' engineers and costing them out at current wage levels with allowance for fringe benefits. The yard expenses were apportioned to Coast Line and Seaboard on the basis of the traffic expected to be handled by each through the port. Maintenance of ways and structures on the line was similarly apportioned between the carriers on the basis of the gross ton-miles expected to be handled over the line by each carrier. Gross revenues expected to be earned by each carrier from operations over the line were separated into revenues on the line and revenues beyond the line by use of a car-mile prorate, that is, by allocating revenues to the line based on the ratio that loaded car-miles handled on the line bears to total loaded car-miles han-

dled from mines to port. No study was made of the expenses of handling the traffic beyond the line, the carriers merely computing the expenses assignable beyond the line on the basis of 50 percent of the revenues assignable beyond the line. Railway tax accruals as shown in Appendix E were computed as follows: payroll taxes by taking 8.5 percent of all labor expenses developed, and ad valorem taxes on the basis of estimates by the carriers' tax officials. In reaching the results, shown in appendix E, no provision was made for Federal income taxes, return on investment, depreciation of roadway, or unrecovered cost of handling wet rock. The latter item relates to the carriers' costs for handling wet rock from mines to washers and dryers. This traffic, as stated, is handled at rates considerably below handling costs so that the carrier may retain, under transit rates, the lucrative dry-rock traffic from the dryers to the port, hereinbefore referred to as "captive" rock.

The results shown in appendix E were reached by use of a weighted average haul, from mines to port, of 70.9 miles for Coast Line and 60 miles for Seaboard. To compute these weighted average hauls, the carriers used the actual rail distances from each origin point to the port over the Piney Point line and the estimated volume of traffic expected to move from each origin. As indicated, these traffic volumes and distances, in proper relation, were not disclosed of record. As an alternative method, using the same gross revenues and operating expenses, the carriers' estimates were recomputed by use of a simple average haul for each carrier, 65 miles for Coast Line and 61 miles for Sea-

board. Under this method, the projected tonnages were treated as moving the average rail distance from mine to port. The results under this method, using only evidence of record, did not vary greatly from results obtained by use of weighted averages. As seen, by use of weighted averages, the estimated net railway operating income for the first year of operation, after port facility rents was $1,794,782. The comparable result obtained by use of simple average hauls was $1,801,379.

The Railroads contend that, based on reductions in the number of employees required at the port facility, the number of trains to be operated, the number of switch engine assignments, and in car detention time at port, counterbalanced to some extent by increases in the number of locomotives to be used per train, operations over the Piney Point line would result in aggregate annual net savings of $563,100.

The Tam-Phos Line - Under its corporate charter, Tam-Phos may construct and operate a railroad and appurtenant port facilities, among other things, and may issue 10,000 shares of stock, par value $100 each. All 10,000 shares have been subscribed to by PSI, which has paid $1 million therefor. The president of Tam-Phos is Robert Thomas, of Tampa, who has long been associated with the phosphate industry in Florida. Thomas is president, also, of PSI, PTC, and River Gulf Terminal, Inc. (RGT), affiliated companies. PSI owns the Port Sutton site, and in conjunction with PTC is engaged in further development of Port Sutton. RGT owns and operates terminals at Hookers Point in Tam-

pa harbor and at Port Sutton for the handling of waterborne bulk commodities. Thomas is also a director of one of the largest motor carriers in the South specializing in the transportation of bulk commodities, including phosphate rock. Construction of the Tam-Phos line would be by Tam-Phos, and shortly after its incorporation Tam-Phos retained an engineering firm to prepare the necessary engineering data, and an appraisor to estimate the cost of acquiring the right-of-way.

The operating headquarters of the Tam-Phos line would be at or near Pierce, where a proposed connection with the South Pierce Railroad would serve as the eastern terminus of the line. The terrain to be traversed by the line is generally level, with some hilly areas. The eastern and central portions of the line would cross undeveloped phosphate reserve lands and pasture lands, with some wooden areas and farms. The area immediately adjacent to the western terminus is being developed industrially. No urban areas would be traversed. The line would cross, successively from the east, Seaboard's Boca Grande Branch, State Highway 37, Seaboard's line between Edison and Bradley, State Highway 39, Seaboard's Sarasota Branch, the Alfia River, U. S. Highway 301, and Coast Line's Sarasota Branch. In addition, some 25 rural roads and several small streams would be traversed. The right-of-way is roughly paralleled to the north by State Highway 60. Appendix F hereto shows the general location of the Tam-Phos line.

Tam-Phos proposes to acquire a 100-foot right-of-way, primarily from large ownerships, with some

small ownerships west of the Alfia River. The roadbed will be 24 feet, shoulder to shoulder, with side ditches averaging 4 feet in depth. There will be a single main line, laid with standard guage 115-pound rail over concrete ties on limestone ballast. Rails, in 1,400-foot lengths, will be welded, possibly at the site. Yard, pass and turnout tracks will be laid with 100-pound rail over wood ties treated with creosote. The maximum grade will be 0.75 percent, and the average amount of curvature per mile 0.58 degrees. Some 5 trestles will be required, and about 1.1 million cubic yards of fill for grading, most of which is expected to be acquired within the right-of-way. About midway on the line there will be a 120-car pass track, and a yard, near Pierce, with 3 tracks having an aggregate length of 16,500 feet. The Coast Line and Seaboard main line crossings at grade will be protected with automatic signals and interlock. State and rural roads will be crossed at grade, protected by flashing lights or standard crossbars. U. S. Highways 41 and 301 will be crossed by overpass.

As proposed to be constructed, the line is described as adequate to handle, annually, more than 3 million tons of wet rock and more than 3.8 million tons of dry rock from the mine fields to Port Sutton. To operate over the line, 5 locomotives, 2 cabooses, 150 open hoppers, and 300 port dumps will be acquired. Present plans call for lease, rather than purchase, of the hoppers and dumps. Maintenance of equipment and ways and structures will be contracted out.

Operations over the line will be in non-scheduled trains of about 70 cars each, with an aggregate of from

180 to 220 cars expected to be moved over the line daily to Port Sutton. About 40 employees would be required to operate the line and perform all necessary services in connection therewith. The line will not reach the mine or plant of any shippers; instead, the shippers will be expected to furnish their own track to make connection with the line. About 8 shippers[13] in the Pierce area are said to be so located as to permit them to use the line for their port rock. In these circumstances, gathering and classification by Tam-Phos, it is alleged, would be reduced to a minimum. Tam-Phos does not propose to join in through rates or interchange traffic with other carriers, or to haul any other traffic than phosphate rock and its allied products. No stations will be established between Pierce and Port Sutton; however, any shipper choosing to locate on the line would be served, but only in connection with shipments of rock. In essence, Tam-Phos proposes to offer only a single, highly-specialized service, the transportation of rock "in a steady stream to the Port of Tampa." Car turnaround time, that is, the time consumed in moving a loaded car from origin to Port Sutton, and on return, empty, to origin, is expected to be 24 hours. As put by Thomas, "It is going to look like a railroad, it is going to use conventional railroad equipment, but it is going to be more like a conveyor belt."

Port Sutton - Development of the existing facilities at Port Sutton was commenced by PSI in 1954. Port Sutton, as stated, lies just south of Tampa and the juris-

---

[13]International, American, Davison, Armour, Swift, Cyanamid, V-C, and Kerr-MGee.

diction of the Tampa Port Authority. Port Sutton has a slip, channel and turning basin now dredged to a depth of 34 feet. The dredging was performed at the expense of PSI and the Tampa Electric Company (Tam-Elec), at a cost of more than $1 million. Spoil from the dredging was used to fill in approximately 200 acres of land south of the slip, and it this southside land, an area about 800 feet wide and 2 miles long, that will be the site of the shiploading, storage and yard facilities proposed to be constructed by PSI and PTC to serve the Tam-Phos line.

The existing facilities at Port Sutton are located on the north side of the slip, and include, in addition to RGT's bulk-commodities terminal, a sulfur terminal, an ammonia plant, a cement plant, a salt plant, an oil depot, Tam-Elec's power plant, and a phosphate terminal which is owned and operated by International. The power plant is a major user of coal, which is brought in by barge, and ten percent of Tam-Elec's output is consumed by the phosphate industry. The phosphate terminal is the culmination of years of effort by PSI to locate a public phosphate terminal at Port Sutton, and was finally completed by PTC in March 1965 at which time it was acquired by International. The facility incorporates a railroad yard, wet and dry rock unloading pits, ground storage for wet rock and silos for storage of dry rock, a chemical storage building, and a shiploading gantry. Wet rock may be discharged from cars at a rate of 600 tons per hour to be moved by conveyor to some 16 ground storage piles. The dryer has a capacity of 300 tons per hour. The shiploading gantry has a capacity of 1,800 tons

per hour, and rock may be loaded directly from the rail cars or from 16 silos with an aggregate capacity of 60,000 tons. International expected to handle some 3 million tons of rock over this facility in 1966. The development of Port Sutton, to date, represents an investment of over $100 million.

The phosphate terminal proposed to be constructed on the south side will be owned and operated by PTC. The site has been prepared, a loan commitment has been obtained, and the commencement of construction of the terminal is planned as soon as construction and operation of the Tam-Phos line is approved. Envisaged by applicant is a railroad yard ample to handle 600 cars. Loaded cars reaching the yard would be immediately moved to 2-car and 3-car unloading pits, with respective unloading capacities of 1,500 tons and 2,200 tons per hour, and dumped. Empties, as stated, would be returned to the loading points within 24 hours. Conveyor belts with a capacity of 3,000 tons per hour would move the dry rock to 24 storage silos with an aggregate capacity of 100,000 tons. As on the north side, wet rock would be stored on the ground in piles. Mechanical blenders under each silo would permit blending of the rock from any of the silos to any combination of grades. From the silos the rock would move over conveyors, after being weighed by belt scales, to the gantry to be loaded on vessel. The gantry, with a loading capacity expected to average 2,000 tons per hour, will be able to travel the length of the vessel and to trim in and out a distance of 46 feet. Trimming will be accelerated by a retractable boom and swivel loaders, so that the full reach of the vessel may be loaded. The entire load-

ing operation would be protected by dust control equipment. Initially, a singly gantry and gantry dock would be constructed, but ample space is available for construction of an additional facility in the future if needed.

The storage silos are said to be the most important feature of the proposed facility. The ample storage capacity to be provided, it is alleged, would eliminate storage in cars and thus facilitate quick car turnaround, would provide the shippers with additional storage capacity for their rock, and would make the shiploading function independent of the rail movement to a great extent. The storage capacity of the silos, it is stressed, would permit the continuous loading of 10 10,000-ton vessels, and greatly accelerate ship turnaround.

The initial classification of the cars by ownership and grade will be performed at the yard at Pierce. Trains reaching the yard at Port Sutton will be split up into strings of cars by ownership, classified as to grade, and moved in predetermined order to the unloading pits. Applicant emphasizes that the trains would be relatively short and would consist of cars from no more than five or six mines, and insists that classification in these circumstances would represent no great problem.

Tam-Phos, PSI, AND PTC take the position that the construction of the Tam-Phos line and appurtenant facilities at Port Sutton is impelled by the proposal of the Railroads to divert the movement of phosphate rock

from Tampa, and by the refusal of the Railroads to provide reasonable and adequate rail service to Tampa and Port Sutton. In the latter connection, it is contended that repeated efforts were made by Thomas and by other Tampa interests to secure the cooperation of the Railroads in providing new, modern terminal facilities for the handling of phosphate rock at Port Sutton or adjacent sites, but that the only result was the instant proposal by the Railroads to divert the traffic elsewhere.

Cost of Construction, Tam-Phos Line - Shown in appendix G hereto is applicant's estimate of the cost of constructing the Tam-Phos line, including pass and yard tracks. The land acquisition cost is based on a report made in December 1965 by an experienced appraisor of the cost of acquiring the necessary 403 acres of land for the right-of-way, yard, and passing track, and includes allowance for severance damages and drainage, as well as the expense of processing title to the lands. The land values are said to reflect comparable sales in the area, and range from $112 to $1,000 per acre. The costs shown for highway overpasses reflect only half the estimated cost of constructing these facilities it being expected, by applicant, that the remainder of these costs would be borne by the public authorities, either Federal or state. As previously indicated, Tam-Phos proposes to lease the necessary cars, and the estimate, accordingly makes no provision for purchase of rolling stock.

Estimated Revenues and Expenses, Tam-Phos Line- Tam-Phos' projected statement of revenues and expen-

ses for the proposed line is predicated upon the movement of 6.85 million tons of phosphate rock during the first year of operation. The availability for movement over the line of this volume of rock was estimated by Thomas as a result of a recent survey by him of the various shippers and of the industry generally. As shown in appendix H hereto, such a movement would yield operating revenues of $4.11 million, based on a rate of 60 cents per ton proposed to be charged by Tam-Phos for line-haul movements of rock from Pierce to Port Sutton. The railway operating expenses shown are based in part on estimates prepared by Thomas and an operating consultant, and in part on regional average railway operating costs. Equipment rents are based on estimated charges of $175 per month each on port dumps and $160 per month each on open hoppers, including allowance for maintenance. Railway tax accruals are at a rate of $22,000 per $1 million, said to be the prevailing rate on the east coast of Florida, applied to the total investment without equalization adjustment. Included is provision for Federal income taxes, based on a rate of 48 percent without reduction for investment credits. The fixed charges consist of interest on funded and unfunded debt at the rate of 6 percent per annum. The funded debt represents a proposed issue of $6.78 million in first mortgage bonds, and the interest thereon would remain constant. A sinking fund would be established at the rate of $160,000 per year after the first year to redeem half of the bond issue within the first 20 years of operation of the line. The unfunded debt consists of the balance due on the purchase price of the 5 locomotives proposed to be acquired. A down payment of 20 percent would be made,

the remainder to be paid within 5 years. Interest on the unpaid balance would decline each year until the debt is retired. As did Coast Line and Seaboard, Tam-Phos anticipates a 5 percent successive increase each year in its volume. At this rate, its net income after fixed charges for the fifth year of operation would reach $724,000, and its return on investment would rise to 9.2 percent.

Tam-Phos and its affiliated companies are prepared to invest upwards of $14 million in the aggregate to construct and place in operation the Tam-Phos line and the appurtenant facilities at Port Sutton. Based on studies made by Thomas, including comparisons with the costs of operating the existing facility at Port Sutton operated by International, applicant avers that the proposed terminal at Port Sutton could be operated efficiently and profitably at a rate of 55 cents per net ton. Thus, the overall rate, mine to vessel, over the Tam-Phos line would be on a parity with the present on-vessel rate observed by Coast Line and Seaboard to the port of Tampa, and with the rate proposed to be established by those carriers to Port Manatee. The Railroads publish a line-haul rate of 75 cents per net ton on phosphate rock to Port Sutton, but this rate is contingent upon an annual movement of at least 2 million tons.

Shipper Support, Tam-Phos Line - At the Tam-Phos hearings, a witness for only one shipper, International, appeared voluntarily to testify. International, said to be one of the world's largest producers of phosphate rock and other fertilizer ingredients, ships more than

3 million tons of rock and 250,000 tons of allied products from the west coast of Florida. Its principal operation is at Noralyn, where it produces over 3 million tons of rock a year. It has a mine and dryer at Mulberry, which produce about 1 million tons of rock a year, and a mine at Imrock from which about 2 million tons of wet rock moves annually to dryers at Noralyn, Mulberry and Port Sutton. The dryer at the latter point has a capacity of 2 million tons per year. A new complex is being placed in operation at West Polk which will produce some 2 million tons of dry rock per year. International indicated that, if it proved economical to do so, it would use the proposed Tam-Phos line, and that the traffic available for movement over the line would be the 2 to 5 million tons of rock expected to move annually from Imrock and West Polk to Port Sutton. At present, all of its port rock moves by rail to its company-owned facility at Port Sutton.

At the request of Tam-Phos, officials of 8 of the shippers which had supported the Piney Point application were subpenaed to appear at the Tam-Phos hearings, and of these 7 were called to testify.[14] None of these shippers would support the Tam-Phos application, and only Kerr-McGee and Olin indicated that they would consider using the Tam-Phos line if it proved economical to do so. Swift, on the other hand, indicated that if both the Piney Point and Tam-Phos lines were placed in operation, this shipper would use only the Piney Point line.

---

[14]American, Olin, Swift, Cyanamid, V-C, Davison ,and Kerr-McGee.

There was testimony in support of the Tam-Phos line by the president of Gulfcoast Transit Company, of Tampa, a water carrier engaged in hauling bulk commodities, by barge, between Tampa and New Orleans, La., among other places. Annually, this carrier transports more than 1 million tons of coal to Tam-Elec's power plant at Port Sutton, and 700,000 tons of phosphate rock on return from Port Sutton and Port Tampa to New Orleans. Substantial increases in traffic volume are anticipated. Although the rock which it hauls is sold f.o.b. the mine, this carrier ordinarily routes the traffic from mine to port. All of the phosphate rock which this carrier routes would be moved over the Tam-Phos line to Port Sutton, if that line is placed in operation, to avoid substantial delays and demurrage charges incurred in loading vessels at Port Tampa. It was indicated, also, that if it became necessary for this carrier to move its vessels to Port Manatee in order to secure its return loads of rock for New Orleans, additional costs amounting to $600 per trip would be incurred in its operations.

Labor Interests - As stated, the Brotherhoods oppose both applications. They take the position that the granting of either application, or both, would inflict extensive injury upon employees of the Railroads. In the case of the Tam-Phos application, such injury, it is alleged, would result from extensive diversion of traffic from the Railroads by Tam-Phos. Should either or both application be granted, it is urged the Commission should impose the same conditions for the protection of employees as were imposed *in New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271. Such condi-

tions were designed for the specific purpose of giving protection to railroad employees in section 1(18-20) proceedings who are not to be adversely affected in their employment until several years after the date of an order authorizing such transaction and who otherwise would receive little or no protection. By the very nature of the authority sought in these proceedings, it is contended, injury to the employees would not materialize until after construction of the proposed lines of railroad. Tam-Phos, as the benefiting party in the Tam-Phos case, it is argued, should be made responsible for the protection of Coast Line and Seaboard employees adversely affected by approval of that application, following the principles set forth *in State of Okla., Ex Rel. Dept. of Highways, Abandonment*, 324 I.C.C. 666.

The evidence shows that the Piney Point proposal would undoubtedly have some adverse effect on railroad employees. As previously indicated, some switching would be eliminated at Uceta and Yoeman yards, train services between Tampa and the interior would be cut down considerably, yard assignments at Port Tampa and Seddon Island would be reduced, and fewer stevedores would be required in the shiploading operations at Port Manatee. The Railroads would attempt to absorb these employees into their operations on the Piney Point line and at Port Manatee, but they concede that not all employees could be absorbed. Employees transferring to the Piney Point operation would continue to report at Tampa, but employees transferring to Port Manatee would have to travel some 40 miles by highway to report. Also, employees changing seniority districts would be adversely affected. The effect

on Coast Line and Seaboard employees from the Tam-Phos proposal, of course, would depend upon the extent of the diversion of traffic which would result. The Railroads insist that increases in the volume of port rock traffic would tend to eliminate or mitigate any adverse effect upon employees.

The Longshoremen contend that the benefits and savings on the basis of which the Railroads are attempting to justify the proposed construction are dependent upon abandonment by the Railroads of their shiploading facilities at the Port of Tampa, and that the employment of the Longshoremen's employee-members is imperilled by such abandonment and can be protected only by a hearing pursuant to an application properly filed for authority to effect such abandonment. They insist that the instant application of the Railroad is thus improperly before the Commission and should not be considered unless and until appropriate application is filed for authority to abandon the facilities at the Port of Tampa. The Longshoremen had filed an action with the Federal district court in Tampa to enjoin the Seaboard from abandoning its Seddon Island facilities unless and until it received appropriate authority therefor from the Commission, and, at the instant hearings, joined by certain other labor interests, the Longshoremen moved to stay these proceedings until the Railroads receive authority to abandon these facilities. These motions were denied. So far as appears in this record, the Railroads do not propose to abandon their facilities at the Port of Tampa and would continue to honor routings of port rock designating the Port Tampa or Seddon Island facilities as the point of destination.

The position of the Railroads with respect to employee-protective conditions is that the imposition of such conditions is not warranted in the circumstances here presented.

Maritime Interests - A barge line (Mechling) operates between Tampa and the Midwest via the Gulf of Mexico, transporting bulk and packaged cargo to Tampa, and phosphate rock on return. Inbound cargo is unloaded in the Port of Tampa and the empty barges are shifted by local tugs to the phosphate loading facilities in the port to take on cargo. If it becomes necessary to shift its barges the additional distance to Port Manatee to secure its return hauls, increased charges and transit time would be incurred. This carrier contends, moreover, that the Port Manatee site affords its barges less protection from the weather than Tampa Harbor. A ship repair company (Tampa Ship Repair) performs topside repairs on vessels docking at the Port of Tampa. Many of these vessels bring general cargo into Tampa and transport phosphate rock outbound. Its business is dependent upon the continued movement of vessels in and out of Tampa. Diversion of the phosphate traffic and vessels to Port Manatee would increase the cost of servicing these vessels and such increased costs would be multiplied if the general cargo traffic and vessels follow the phosphate to Port Manatee. This company serves vessels at points as distant as Boca Grande, but finds its operations beyond the Port of Tampa to be costly and inefficient. A ship chandler (Tracey) outfits and supplies vessels docking at Tampa. Servicing vessels engaged in the phosphate movement yields about 65 percent of this com-

pany's revenues or about $216,000 annually. It also serves vessels at Boca Grande and would serve vessels at Port Manatee if the phosphate traffic moved there, but its operations at Boca Grande are unprofitable and it feels that operations at Port Manatee would likewise be unprofitable because of its distance from Tampa and the lack of necessary facilities at Port Manatee.

A steamship agent (Fillett, Green & Company) handles all of the port functions, such as docking arrangements, solicitation of cargo, accounting, etc., for numerous vessels docking at Tampa. About 35 percent of the vessels for which it acts as agent load only phosphate, and disbursements made by the agent in behalf of such vessels constitute about 15 percent of the $3.2 million which it expends annually for its principals. About 50 percent of the vessels handled by this agent and about 31 percent of its disbursements relate to vessels carrying mixed cargo, that is, general cargo and phosphate rock. The witness, its vice-president, testified that many vessels, after loading phosphate at Tampa, shift to general cargo piers to topload the phosphate with general cargo in small shipments ranging up to 400 tons. If the vessels were to load phosphate at Port Manatee, shippers would incur additional expense in shifting the vessels to Tampa to take on general cargo, expense representing duplicating harbor documentation and additional pilotage. If general cargo facilities were made available at Port Manatee, according to the witness, shippers would insist on discharging the general cargo portions of such mixed cargoes at Port Manatee, thus requiring the consignors, located mostly at Tampa, to incur additional expense

n picking up the shipments. The agent's business would be adversely affected in that it would have to establish branch facilities at Port Manatee, a site remote from the many auxiliary services available to the agent at Tampa.

The foregoing companies oppose the Piney Point application. Each is dependent upon the thriving maritime activity at the Port of Tampa, and fears that diversion of the phosphate traffic from Tampa to Port Manatee would ultimately be followed by the diversion of other traffic from Tampa and the gradual decline of that port. Each indicates that while it would follow the traffic to Port Manatee, it is apprehensive that such a move would be fraught with economic hardship in the form of increased operating expenses not compensated by increased revenues.

The Tampa Group - The Tampa Group vigorously opposed the Piney Point application. The component members of the Group (the City, the Chamber of Commerce, and the Port Authority) are by their very nature vitally concerned with the economic well being of Tampa and its port. They regard the phosphate traffic as the principal basis for the emergence of Tampa as a major world port and as a bulwark and mainstay of its present commercial pre-eminence. They contend that the diversion of all or a substantial part of the phosphate traffic from Tampa by the Railroads, admittedly part and parcel of the Piney Point proposal, would strike a mortal blow at the Port of Tampa. By railroad fiat, they declare, Tampa would be reduced ultimately to a second-class port, and a tremendous

investment made in the harbor and shoreside facilities by the local community and the State and Federal governments would be in a great measure lost. The Tampa Group perceives no compensating virtues in the Railroads' proposal. The Group stresses that the Coast Line, over its Sarasota Branch, is in a position now to provide service to Port Manatee without major expenditure of funds for new construction. The Group asserts that the Railroads, now at the very brink of unification as a result of *the merger* case, can, by simply exercising the same spirit of cooperation manifested in the Piney Point application, readily provide the Seaboard with like access to Port Manatee. The Group points out that the traffic which would move over the new line would be the same traffic which would otherwise have moved over the Railroad's existing lines, and contends that the proposed construction would thus yield the Railroads no additional revenues. The Group views the expenditure by the Railroads of upwards of $8 million, in these circumstances, as patently unsound. These protestants take the position that the construction and operation of the Piney Point line is not required by the public convenience and necessity, would be contrary to the national transportation policy, and would, in view of the quasi-monopolistic position enjoyed by the Railroads in the terminal processing of water-bound phosphate on the west coast of Florida, constitute a combination in restraint of trade contrary to the Federal anti-trust statutes.

The Tampa Group takes issue with the Railroads' claim that operations over the Piney Point line would result in aggregate annual net savings. The Group em-

phasizes that with respect to rail distances from bone valley origins, Tampa enjoys a distance advantage over Port Manatee said to be 7 miles over Coast Line and 20 miles over Seaboard, using the Piney Point line to the latter point. Protestants estimate that, taking into account increased operating expenses for the additional distance in such items as engine fule, supplies, and depreciation, cars repairs, maintenance of way, depreciation, and interest on average undepreciated cost of the new line, the increase in operating costs attributable to increased distance would average $17,239 per mile. The Tampa Group argues that the Railroads' estimated savings ignores, among other things, the cost of capital. The $8 million proposed to be invested in the Piney Point line, it is urged, has an earning power which is foregone if expended for the proposed construction. Taking into consideration the reasonable earning power of this sum, according to protestants, the Railroads, far from experiencing a net annual savings, would in fact suffer a net annual operating loss of income of more than $670,000.

One of the justifications advanced in support of the Piney Point proposal, as stated, is the inherent difficulty in conducting rail operations through the congested areas of Tampa. The Tampa Group contends that these difficulties have been grossly exaggerated. Such difficulties as do exist, it contends, could be avoided by the construction of modern facilities at Black Point, either by the Railroads or by public authorities, and by adjustment of the lines of the Railroads so as to avoid the congested areas. In this connection, the Tampa Group suggests the construction of a cut-off line

to the Black Point site from Brandon, near Valrico on Seaboard's main line. Connections would be required, also, between the two Railroads at Plant City and between Uceta and Yoemans yards. Coast Line trains could be diverted at Plant City to the Seaboard's line, and 150-car trains of both carriers could proceed intact to the port. Uceta and Yoemans would be available nearby for peak-season storage of cars, and the total distances from the mines to the port would be reduced somewhat. The so-called Brandon cut-off, including the connections at Plant City and at the yards, would cost about $2 million, according to the Tampa Group's witness, an engineer with an extensive background in railway operations.

The continuing efforts of the Tampa Group to establish in the Tampa area phosphate terminal facilities independent of those maintained by the Railroads has been alluded to herein-before. In this connection, the Tampa Chamber of Commerce and Port Authority, in mid-1965, under section 6(1) of the act, filed complaints with the Commission against the Railroads and their tariff-publishing agents, which alleged that the Railroads publish, on phosphate rock from bone valley to Tampa, for water movement beyond, rates which include in addition to the line-haul service, such accessorial services as wharfage, loading into vessels, and seaworthy trimming, and that the Railroads unlawfully fail and refuse to state separately their rates and charges for these various services. These complainants alleged that in order for them to construct municipal terminal facilities at Tampa it was necessary for them to know what would be the rail line-haul

rates to such facilities, and they requested that the Railroads be ordered to cease and desist from the alleged violations and to establish for the future separate rates and charges for each component transportation service offered and rendered. The rates assailed were found not shown to be in violation of the act as alleged, however, and the complaints were dismissed.[15]

The Tampa Group does not regard the Coast Line-Seaboard application, on the one hand, and the Tam-Phos application, on the other, as mutually exclusive, in the sense that the grant of either should preclude the grant of the other. To the contrary, it asserts that the grant of the Piney Point application would, in fact, impel the grant of the Tam-Phos application. In the face of the Railroads' control of the rail transportation of phosphate rock from bone valley to the west coast of Florida, the pending merger of these carriers, and the instant proposal of these carriers to by-pass Tampa in the movement of phosphate rock, the only assurance of competitive rail service to the Port of Tampa, according to the Tampa Group, would be a grant of authority for the proposed Tam-Phos service. Accordingly, the Tampa Group affords conditional support for the Tam-Phos application, that is, if the Commission should grant the Piney Point application, then the Tampa Group supports the Tam-Phos application. In this regard, the Group views both the proposed Tam-Phos line and the supporting facilities to be constructed at Port Sutton as operationally viable to an outstanding

---

[15] In *Greater Tampa Chamber of Commerce v. Atlantic Coast Line Railroad Company et al.*, (not printed), decided June 8, 1966, by the Commission, Rates and Practices Review Board.

degree, and to incorporate technological efficiencies that should be encouraged under the national transportation policy.

The Jurisdictional Issue - Tam-Phos, as stated, seeks the dismissal of its application on the grounds (a) that the Tam-Phos line would operate only in intrastate commerce, and (b) that the line would constitute an industrial track within the exemption of section 1 (22). As previously discussed, Tam-Phos does not propose to operate as a common carrier, but as a 30-mile "conveyor belt" transporting only wet and dry rock from industry connections in bone valley to Port Sutton. The rock, it alleges, would come to rest at Port Sutton; the wet rock at the ground storage piles and the dry rock at the silos. Before being loaded on vessel and shipped out, the wet rock would undergo a change of form in the dryer, it is further alleged, and the dry rock, both from the silo and from the rail cars for direct loading on vessel, would also undergo a change of form through the blending process. In these circumstances, Tam-Phos contends, the transportation of these products by Tam-Phos would constitute intrastate commerce. In support, Tam-Phos cites *Arkadelphia Milling Co. v. St. Louis S. W. R. Co.*, 249 U. S. 134, called the *Arkadelphia* case, as to wet rock, and *Atlantic Coast Line R. Co.* v. *Standard Oil Co.*, 275 U. S. 257, called the *Standard* case, as to dry rock. Further reliance is placed on *Construction of Line by G. P. & N. R. R.*, 76 I.C.C. 437, called the *Grand Prairie* case.

The *Grand Prairie* case is clearly inapposite, involving only a shipper's proposal to construct a 0.75-mile

extension to a 2.9-mile private spur of another shipper in order to move its products in intrastate commerce. The *Arkadelphia* and *Standard* cases, however, do involve factual situations broadly analagous to that considered here, in which the courts applied the classic tests long recognized by the courts and the Commission as determinative of whether a particular transportation constitutes interstate or intrastate commerce, namely, continuing intent, continuity of movement, and substantiality of identity. In *Arkadelphia* rough lumber moved by rail from the forest to the mill in the same State, where it was manufactured and the finished products ultimately shipped to destinations in another State. No transit arrangements were involved, and the finished products did not move from the mill until some 5 months after the rough lumber was received. At the time of shipment from the forest, the ultimate consumer was not known. It was known, however, that 95 percent of the finished products normally moved beyond the State. The court, in holding the movement from forest to mill to be intrastate commerce, said:

> It is not merely that there was no continuous movement from the forest to the points without the State, but that when the rough material left the woods it was not intended that it should be transported out of the State, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its character, utility, and value.

The instant case is distinguishable in that there would be a continuing intent on the part of the shipper that

the rock would move to destinations beyond Florida after being dried, to known consignees who ordinarily take title to the rock either at the mine or at the vessel. It is not shown that the drying process, which merely extracts the water, materially changes the character, utility or value of the rock. The break in the flow of commerce occasioned by the ground storage of the rock, moreover, is not so sharp as to transform into two movements one that is, for regulatory purposes, interstate in character, Compare *McKenzie Tank Lines, Inc., Extension-Phosphate*, 102 M.C.C. 187.

Standard is alleged to be the reverse movement to that involved here with respect to dry rock. In *Standard*, oil was brought by vessel from beyond the State and pumped into plaintiff's storage tanks at Tampa and Jacksonville. The tank was the only destination known to the consignor. From the tanks plaintiff supplied oil to its customers throughout Florida, as needed, moving the shipments in rail tank-cars. There was no through rate or joint arrangement between the water and rail carriers. At issue was whether the rail movement from the tanks were interstate or intrastate in character. In reaching its conclusions, the court emphasized that the question of whether commerce is interstate or intrastate must be determined by the essential character of the commerce. It found controlling the fact that there was neither necessity nor purpose for the oil to move through the seaboard storage stations to interior points by immediate continuity of transportation, the nature of plaintiff's operations being simply to store the oil at the tanks for convenient distribution to inland points as needed. The tanks were found to be the natural pla-

ces for change from interstate and foreign transportation to intrastate transportation, there being nothing in the history of the transaction, either in intent or in fact, to make them otherwise. In the instant proceeding, on the other hand, in the customs and usages of the industry, the rock leaves the mines destined to known consignees beyond the State. The rail carrier's function is to provide an expeditious service to the vessel, with stopover at the port only to perform the necessary mechanics of the transfer operation. The blending or mixing of the different grades and parcels of rock at the port cannot be found, on this record, to work any material change in the nature of the rock. The conclusion is warranted that the transportation in dry rock, too, constitutes interstate transportation in the circumstances presented. Compare *Walker Hauling Co., Inc. Extension-Phosphate*, 84 M.C.C. 371.

In connection with its alternate contention, that the proposed line would constitute an industrial track within the meaning of section 1(22) Tam-Phos emphasizes the specialized nature of the service which it proposes, and cites various decisions of the Commission and the courts which it contends fully support its position. This contention is equally without merit. The criteria to be observed in determining whether the construction of a line of railroad requires the Commission's certificate are well established. While the Congress, in enacting the Transportation Act of 1920, did not define the term "extension" or the terms "spur" and "industrial" tracks as used in section 1(18-22), the Supreme Court has stated that a guide to the meaning of these terms is furnished by the context of the act and by the relation

of these specific provisions to the national railroad policy formulated by that act. *Texas & Pac. Ry. Co.* v. *Gulf C. & S.F. Ry. Co.*, 270 U. S. 266. The Court stated therein that Congress undertook by that measure to develop and maintain an adequate railway system, that the preservation of the earning power and financial resources of individual carriers is a matter of national concern, and that the building of unnecessary railroad lines involves a waste of resources, the burden of which may fall upon the public. Referring to spur, industrial, team, switching or side tracks to be located wholly within one state, the Court pointed out that such tracks are commonly constructed either to improve the facilities required by shippers already served by the carrier or to suppply the facilities to others, similarly situated, who are entitled to like service from the carrier. Whether such tracks should be constructed, the Court stated, is a matter which the state regulatory authorities are peculiarly fitted to determine, particularly since the expenditures and distances involved are usually small. The Court emphasized, however, that where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier or other carriers, such invasion may be inimical to the national interest. As stated by the Court, at pages 278-9:

> If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad, within the meaning of paragraph 18, although the line be

> short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the (Commission) issues its certificate that public necessity and convenience require its construction.

The courts have held, also, that the question of whether a particular track is an "extension" or merely a "spur" or "industrial" track is a mixed question of law and fact, that in each case such determination must be made on the basis of the facts presented in the light of the congressional policy, and that a liberal or broad construction must be given to the term "extension" and a limited or narrow construction given the terms "spur" and "industrial" tracks. See *Georgia R. Construction and Operation,* 320 I.C.C. 25, and proceedings therein cited.

The evidence shows that the proposed Tam-Phos line would be a substantial extension (30 miles), that it would involve expenditure of a significant sum ($7.8 million), and that it would extend into territory (bone valley) presently served by other railroads and not now served by applicant. No other conclusion is possible in these circumstances but that it would constitute an extension within the meaning of section 1(18), and that the Commission has jurisdiction to consider the merits of the proposed construction. The motion to dismiss must, perforce, be denied.

GENERAL DISCUSSION AND CONCLUSIONS

The criteria to be considered by the Commission in determining whether the construction and operation of new or extended lines of railroad should be authorized are set forth in the statute, as amplified by the Commission and the courts in numerous proceedings. Under the statute, justification for the construction of such a line must be established by clear proof that the line is to be both a public convenience and a public necessity. *Galesburg & G. E. R. Co. Construction,* 244 I.C.C. 470. The Commission has emphasized that the latter term implies a strong or urgent need, and that the interests of shippers are matters of substantial importance is resolving the question. *Chicago & N. W. Ry. Co. Construction,* 312 I.C.C. 639. It has been held that carriers serving a particular territory should normally be accorded the right to transport all traffic, both existing and potential, which they can handle adequately, efficiently, and economically, before a new operation is authorized. *Northern Pac. Ry. Co. Construction,* 295 I.C.C. 281. It has been pointed out, on the other hand, that no carrier has a vested right to the exclusive occupancy of any particular territory. *Pennsylvania R. Co.* v. *United States,* 40 F. (2d) 921. Construction has been authorized for a wide variety of reasons, as indicated in the numerous decisions cited by the respective applicants herein, and for an equally wide variety of reasons, in other proceedings, approval has been withheld, as indicated in citations noted by the respective opponents. In these and other decisions the Commission and the courts have construed the purpose of section 1(18-20) to be to enable the Commission, in the interest

of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service, but it has been recognized that the wording of this section of the act does not permit the formulation of an equation which can be applied with mathematical precision. See *Texas & Pac. Ry. Co. v. Gulf C. & S. F. Ry., supra.*, and *Chesapeake & O. Ry. Co. v. United States*, 283 U. S. 35.

This, then, is the central issue herein: Does the present or future public convenience and necessity require the construction and operation of either or both of the proposed lines? And yet, much evidence was adduced in this record, by one party or the other, that perhaps has no direct bearing on this central issue. Such matters as the alleged propitious effect of the Piney Point proposal on Manatee County, the alleged calamitous effect of that proposal on the Port of Tampa, the alleged importance of the Tam-Phos proposal to the further improvement of Port Sutton, and others, were developed at great length at the hearings. It was suggested, more than once, that such matters might more appropriately be raised in "proceedings under the Economic Opportunity Act." Nevertheless, it is quite clear that there is more at stake here than the mere construction of a given number of miles of track, and that these proceedings are of great moment not only to the carriers involved, but to the Port of Tampa and the legitimate aspirations of Port Sutton and the people of Manatee County, and to the phosphate industry of Florida as well. The Railroads put it thus: "Certainly, the Commission has not had presented to it recently an ap-

plication, routine in one sense, but yet so fraught with the most serious implications for so many large companies." In this context, it was a matter of necessity that the instant proposals and every reasonable ramification thereof be brought in full view, so that in its deliberations the Commission may be mindful of, and may reach its decision in the light of, the possible effects hereof not only upon the immediate parties but upon the general public whose interests it represents in proceedings before it.

This is not to say, however, that the Commission should attempt to resolve the multifarious side-issues developed, or that these issues can be resolved within the narrow confines fixed by the scope of these proceedings. The question, for example, of whether Port Tampa, Seddon Island, Black Point, Port Sutton, Port Manatee, or any of these or other places is the most suitable site for phosphate ship-loading facilities is not before the Commission, nor can the Commission pass upon the validity of the financing proposed for Port Manatee or upon the merits, if any, of the so-called Brandon cut-off. This inquiry necessarily begins and ends with the question of public convenience and necessity solely as it relates to the proposed Piney Point and Tam-Phos lines.

The respective applicants rely heavily upon the testimony of the supporting shippers, and it is appropriate at this point to examine just what it is that they are supporting. No shipper was heard to complain that its goods are denied access to port by a lack of adequate rail transportation facilities. Their testimony is uni-

formly to the effect that what is lacking is modern, efficient terminal and ship-loading facilities at the port to accelerate turnaround of vessels and rail cars. If there is one thing on which all of the parties to these proceedings appear to be in wholehearted agreement, it is that the existing port facilities are grossly inadequate to handle expeditiously the present volume of port rock and that this volume is steadily increasing. There is no question but that if the Florida producers are to maintain their competitive position in the world market this bottleneck must be eliminated.

It is made clear by their testimony that the shippers would route their traffic to any port on the west coast of Florida within reasonable range of the phosphate fields in which there is provided for them adequate terminal and ship-loading facilities, and that it is a mater of relative indifference to them over which rail lines the traffic moves. In this connection, the failure of the shippers, generally, to appear in support of the Tam-Phos application cannot be construed as reflecting a rejection by them of the proposed development and improvement of Port Sutton for this purpose. Here again is shown their indifference to the construction of a rail line, especially a line to which they would have to build their own connection to reach a port which is already reached by the existing lines of the Coast Line. It would not be mere conjecture, on the other hand, to recognize that in supporting the Piney Point application the shippers take into consideration the fact that this line would utilize the existing web of gathering lines in the fields, and that these applicants have on the rails, and not on paper, a tremendous fleet

of hoppers and port dumps on which the shippers are absolutely dependent to maintain their production schedules. Thus, the shipper support offered for the proposed lines is illusory, and the conclusion is warranted that the record is devoid of probative evidence of a need for these lines by the prospective users thereof. Such need as exists, it is clear, is for adequate port facilities, the construction of which is a matter for interested parties to provide, and for which no authority from the Commission is herein sought, or for that matter, needed.

Implicit in the question of public convenience and necessity for the construction of a line or railroad is the corollary question of whether adequate service to the public otherwise would be provided. *Norfolk S. Ry. Co. Construction and Operation*, 324 I.C.C. 371. Consideration of this question must take into account not only the present volume of traffic moving but also the progressively increasing demands of the phosphate industry for rail transportation to port. Existing rail lines, as seen, reach the threshold of each and every port and port site mentioned in this record, and except in connection with those portions of the lines of the lines of the Railroads extending between Uceta and Yoemans yards on the one hand, and Port Tampa and Seddon Island on the other, there is no convincing evidence that these lines cannot handle the present or projected volume of traffic that moves or is expected to move to these ports. The foregoing represents an oversimplification, to be sure, in that the Seaboard cannot reach Black Point, Port Sutton or Port Manatee, and pending consummation of its unification with Coast

Line, already approved, Seaboard can serve these points only be extending its lines in the Tampa Bay area, or by making arrangements with Coast Line whereby it can interchange traffic or, by appropriate connections, operate over the latter's lines. As seen, however, the Railroads have shown a willingness to act jointly with respect to Port Manatee and in connection with their ill-fated Black Point project. Asked if the Coast Line is willing to permit Seaboard to serve Port Sutton, Coast Line's vice-president replied: "Not at the present time." There is little doubt, nevertheless, that if a public phosphate terminal were operating at Port Sutton, phosphate shippers local to the Seaboard would not be denied access thereto.

The evidence is persuasive, on the other hand, that operating through the congested areas of Tampa does present a real problem to the Railroads. As pointed out by the Railroads, the Commission has in the past authorized the construction of new lines to permit carriers to avoid numerous grade crossings and congested areas in order to connect with water transportation. But the Railroads here are not seeking a more expeditious means of serving the Port of Tampa. Their solution to the problem of congestion and dust control at Tampa is to construct a $7.6 million line to by-pass Tampa. It is not necessary for the purposes of these proceedings to determine whether the by-passing of Tampa is justified, except to point out that, so far as appears, this can readily be accomplished in great part by the use of existing rail lines.

Nor is it necessary, in view of the findings hereinafter, to determine whether the proposed lines, Piney Point or Tam-Phos, would be economically feasible either in terms of construction or operation. The fact that a proposed line may be operated profitably is not in itself determinative of a public need for the construction thereof. *Chicago, B. & Q. R. Co. Construction,* 282 I. C. C. 725. The financial evidence of the respective applicants has been discussed at some length, and it is sufficient to note that the applicants appear to be financially sound and able to undertake their respective projects, and that the methods used are, on the whole, consistent with those accepted by the Commission in proceedings of this nature. The decision herein rests on more basic considerations of public convenience and necessity.

To sum up, the evidence shows very plainly that a critical situation has developed with respect to the rail handling of port rock on the west coast of Florida, and that positive, remedial and concerted action by all interests concerned is imperative and long overdue. The respective applicants and their supporters conceive the instant proposals as constituting necessary steps to relieve the situation. As previously discussed, however, while public need has been shown for adequate port facilities, the record is devoid of probative evidence of public need for the construction and operation of new rail lines to the ports from central Florida. In the absence of such a showing, it is not established that the construction and operation of the Piney Point line, the Tam-Phos line, or both, is or will be required by the public convenience and necessity, as those terms

have been construed by the Commission and the courts. Compare *Norfolk S. Ry. Co. Construction and Operation, supra.*

It is unfortunate that denial of these applications may delay enjoyment by the phosphate shippers and the public of the fruits of the many technological advances in the handling of port rock, hereinbefore discussed, incorporated by applicants in their respective proposed lines and adjunct port facilities. Nevertheless, although the Commission has a duty to promote more efficient transportation services, it is equally bound to foster sound economic conditions in transportation and among the carriers. Each of the considered proposals requires the expenditure of a substantial sum for the construction of a rail line for which, as seen, there is shown no pressing public need. Regardless of whether, considered by itself, the Piney Point line could be operated on a profitable basis, the expenditure of such funds would represent an improvident and unnecessary depletion of the Railroads' resources, particularly since the line would return revenues which, for the most part, are already accruing to the carriers from traffic now moving over their existing lines. Compare *Texas & Pac. Ry. Co.* v. *Gulf C. & S. F. Ry., supra.* Expenditures for construction of the Tam-Phos line, although reflecting an infusion of new money into transportation, would be equally wasteful in that the result would be to burden interstate commerce with unneeded, duplicative rail facilities. The Supreme Court has stated that such wasteful expenditures are not in the best interests of transportation regardless of who foots the bill. See *Purcell* v. *United States*, 315 U. S. 381.

Considering all of the evidence of record, the conclusion is warranted that these applications should be denied. In these circumstances, it becomes unnecessary to determine whether or not labor protective conditions can or should be imposed in these proceedings. Contentions of the parties as to fact or law not specifically discussed herein have been considered and found to be not justified or to be without material significance.

ULTIMATE FINDINGS AND ORDER

The hearing examiner finds, in Finance Docket No. 23688, that the joint construction and operation by Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company of a new line of railroad in Polk, Hardee and Manatee Counties, Fla., between a point near Fort Meade on the one hand, and Piney Point on the other, is not shown to be required by the present or future public convenience and necessity, and that the joint application should be denied.

The hearing examiner finds, in Finance Docket No. 23718, that the construction and operation by the Tampa Phosphate Railroad Company of a new line of railroad in Hillsborough and Polk Counties, Fla., between a point near Pierce on the one hand, and Port Sutton on the other, is not shown to be required by the present or future public convenience and necessity, and that the application should be denied.

Premises considered, it is the ORDER of the hearing examiner that:

The joint application of Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company for a certificate of public convenience and necessity authorizing the joint construction and operation of a line of railroad in Polk, Hardee and Manate Counties, Fla., be, and it is hereby, denied.

The application of the Tampa Phosphate Railroad Company for a certificate of public convenience and necessity authorizing the construction and operation of a line of railroad in Hillsborough and Polk Counties, Fla., be, and it is hereby, denied.

This recommended order shall become effective on the date of service of a notice or order stating that this recommended order has become the order of the Commission.

(Signed) PAUL J. CLERMAN

By the Commission, Paul J. Clerman, Hearing Examiner.

Dated at Washington, D. C., this 24th day of August, 1966.

H. NEIL GARSON,
Secretary

(SEAL)

F. D. No. 23688
Appendix A

APPENDIX A

ATLANTIC COAST LINE RAILROAD COMPANY
GENERAL BALANCE SHEET - JUNE 30, 1965

-ASSETS-

CURRENT ASSETS:			
701 Cash			$ 9,802,61
702 Temporary Cash Investments			20,111,64
703 Special Deposits			2,761,51
706 Net Balance Receivable from Agents and Conductors			3,733,22
707 Miscellaneous Accounts Receivable			7,724,90
708 Interest and Dividends Receivable			366,65
709 Accrued Accounts Receivable			2,137,09
710 Working Fund Advances			240,53
711 Prepayments			143,63
712 Material and Supplies			10,879,01
713 Other Current Assets			46,16
Total			$57,946,97
SPECIAL FUNDS:			
715 Sinking Funds			693,26
716 Capital and Other Reserve Funds			1,758,47
717 Insurance and Other Funds			137,48
Total			2,589,21
INVESTMENTS:			
721 Investments in Affiliated Companies			$84,026,39
722 Other Investments			1,206,71
Total			85,233,10
PROPERTIES:			
731 Road and Equipment Property	$624,432,755		
732 Improvements on Leased Property	1,844,892		
Total Transportation Property	$626,277,647		
735 Accrued Depr.-Road and Equipment	(137,659,317)		
736 Amort. of Defense projects-Rd. & Eq.	(18,034,127)		
Total Transportation Property			$470,584,20
Less recorded Depr. & Amort.			11,589,24
737 Miscellaneous Physical Property			
Total			482,173,44
OTHER ASSETS AND DEFERRED CHARGES:			
741 Other Assets			$ 2,689,73
742 Unamortized Discount on Long-Term Debt			1,714,09
743 Other Deferred Charges			1,377,69
Total			5,781,43
TOTAL ASSETS			$633,724,18

( ) Denotes credit

ATLANTIC COAST LINE RAILROAL COMPANY
GENERAL BALANCE SHEET - JUNE 30, 1965

LIABILITIES AND SHAREHOLDERS' EQUITY

CURRENT LIABILITIES:			
752 Traffic and Car-Service Balance-Cr.			$ 965,792
753 Audited Accounts and Wages Payable			6,470,451
754 Miscellaneous Accounts Payable			3,137,582
755 Interest Matured Unpaid			1,705,665
756 Dividends Matured Unpaid			36,068
757 Unmatured Interest Accrued			1,794,360
759 Accrued Accounts Payable			7,017,440
760 Federal Income Taxes Accrued			2,141,581
761 Other Taxes Accrued			3,930,117
763 Other Current Liabilities			1,791,294
Total			$28,990,350
LONG-TERM DEBT DUE WITHIN ONE YEAR:			
764 Equipment Obligations and Other Debt			$13,472,256
LONG-TERM DEBT DUE AFTER ONE YEAR:			
765 Funded Debt Unmatured:			
(a) Mtge. Bonds-Book Liability	$139,608,820		
Held by or for Company	30,219,000	$109,389,820	
(d) Notes		13,613,951	
766 Equipment Obligations:			
(a) Equipment Trusts		69,239,000	
(b) Conditional Sale Agreements		16,459,192	
Total		208,701,963	
RESERVES:			
771 Pension and Welfare Reserves			4,463
773 Equalization Reserves			2,052,187
774 Casualty and Other Reserves			828,639
Total			2,885,289
OTHER LIABILITIES AND DEFERRED CREDITS:			
782 Other Liabilities			$ 139,989
784 Other Deferred Credits			3,531,536
785 Accrued Depreciation-Leased Property			191,508
Total			3,863,033
SHAREHOLDERS' EQUITY:			
791 Capital stock:			
(a) Common Stock Outstanding	$ 96,762,111		
(b) Preferred Stock	155,400	96,917,511	
Capital Surplus:			
795 Paid-in Surplus	5,360		
796 Other Capital Surplus	9,484,511		
Retained Income:		9,489,871	
798 Retained Income-Unappropriated		269,403,913	
Total		375,811,295	
TOTAL LIABILITIES AND SHAREHOLDERS' EQUITY			$633,724,186

SEABOARD AIR LINE RAILROAD COMPANY
GENERAL BALANCE SHEET
JUNE 30, 1965

ASSETS

CURRENT ASSETS

(701)	Cash	$ 617,901
(701)	Cash in transit	2,340,425
(702)	Temporary cash investments	26,141,381
(703)	Special deposits	1,824,653
(705)	Traffic and car-service balances-Dr.	270,762
(706)	Net balance receivable from agents and conductors	2,224,579
(707)	Miscellaneous accounts receivable	3,993,749
(708)	Interest and dividends receivable	341,543
(709)	Accrued accounts receivable	4,839,947
(710)	Working fund advances	88,156
(711)	Prepayments	221,864
(712)	Material and supplies	11,181,804
(713)	Other current assets	1,052,738
	Total current assets	55,139,502

SPECIAL FUNDS

(715)	Sinking funds	744,688
(716)	Funds with trustees of equipment trusts	5,528,466
(716)	Other reserve funds	120,061
(717)	Insurance and other funds	60,000
	Total special funds	6,453,215

INVESTMENTS

(721)	Investments in affiliated companies-Pledged	5,895,044
(721)	Investments in affiliated companies-Unpledged	2,886,150
(722)	Other investments - Pledged	30,663
(722)	Other investments - Unpledged	826,064
	Total investments	9,637,921

PROPERTIES

(731)	Road and equipment property	590,948,999
(732)	Improvements on leased property	1,230,441
	Total transportation property	592,179,440
(735)	Accrued depreciation - Road and equipment	173,887,410 Cr
(736)	Amortization of defense projects - Road and equipment	15,350,131 Cr
	Total transportation property less recorded depreciation and amortization	402,941,899
(737)	Miscellaneous physical property	19,941,705
(738)	Accrued depreciation-Miscellaneous physical property	597,621 Cr

Miscellaneous physical property less recorded depreciation		$ 19,344,084
Total properties less recorded depreciation and amortization		422,285,983
OTHER ASSEST AND DEFERRED CHARGES		
(741) Other assets		224,44
(742) Unamortized discount on long-term debt		1,455,59
(743) Other deferred charges		1,301,607
Total other assets and deferred charges		2,981,644
TOTAL ASSETS		496,498,26
LIABILITIES AND SHAREHOLDERS' EQUITY		
CURRENT LIABILITIES		
(753) Audited accounts and wages payable		6,294,108
(754) Miscellaneous accounts payable		1,932,335
(755) Interest matured unpaid		79,840
(756) Dividends matured unpaid		1,680,30
(757) Unmatured interest accrued		1,175,494
(759) Accrued accounts payable		11,874,468
(760) Federal income taxes accrued		3,333,490
(761) Other taxes accrued		3,140,187
(763) Other current liabilities		1,383,367
Total current liabilities (exclusive of long-term debt due within one year)		30,893,590
LONG-TERM DEBT DUE WITHIN ONE YEAR		
(764) Equipment obligations and other debt:		
First Mortgage Bonds, Series "B"		52,729
First Mortgage Bonds, Series "C"		74,000
Equipment Obligations		10,435,817
Total long-term debt due within one year		10,562,546
LONG-TERM DEBT DEBT AFTER ONE YEAR		
(765) Funded debt unmatured:		
First Mortgage Bonds, Series "B"		25,136,271
First Mortgage Bonds, Series "C"		21,120,000
Debentures		10,785,000
(766) Equipment obligations		69,033,393
Total long-term debt due after one year		126,074,664
RESERVES		
(771) Pension and welfare reserves		140,833
(773) Equalization reserves		2,170,937
(774) Casualty and other reserves		825,998
Total reserves		3,137,768

F. D. No. 23688
Appendix A Sheet 5

OTHER LIABILITIES AND DEFERRED CREDITS

(782)	Other liabilities		$ 222,951
(784)	Other deferred credits		1,466,458
(785)	Accrued depreciation - Leased property		207,618
	Total other liabilities and deferred credits		1,897,027

SHAREHOLDERS' EQUITY

	Capital stock:		
(791)	Capital stock issued - Common $20 Par Value		97,537,500
	Capital surplus:		
(795)	Paid-in surplus		433,336
(796)	Other capital surplus		53,950,625
	Retained income:		
(797)	Retained income - Appropriated		441,500
	Reacquisition of common stock	$441,500	
(798)	Retained income-Unappropriated		171,569,709
	Total retained income		172,011,209
	Total shareholders' equity		323,932,670
	TOTAL LIABILITIES AND SHAREHOLDERS' EQUITY		496,498,265

The Company is liable as guarantor of the obligations enumerated below:

Jacksonville Terminal Company First Mortgage Bonds	$3,634,000#
Norfolk and Portsmouth Belt Line Railroad Company Conditional Sale Agreement	48,417##
Richmond Terminal Railway Company First Mortgage Bonds	2,042,000#

Guaranteed jointly and severally by the Company and other railroads.

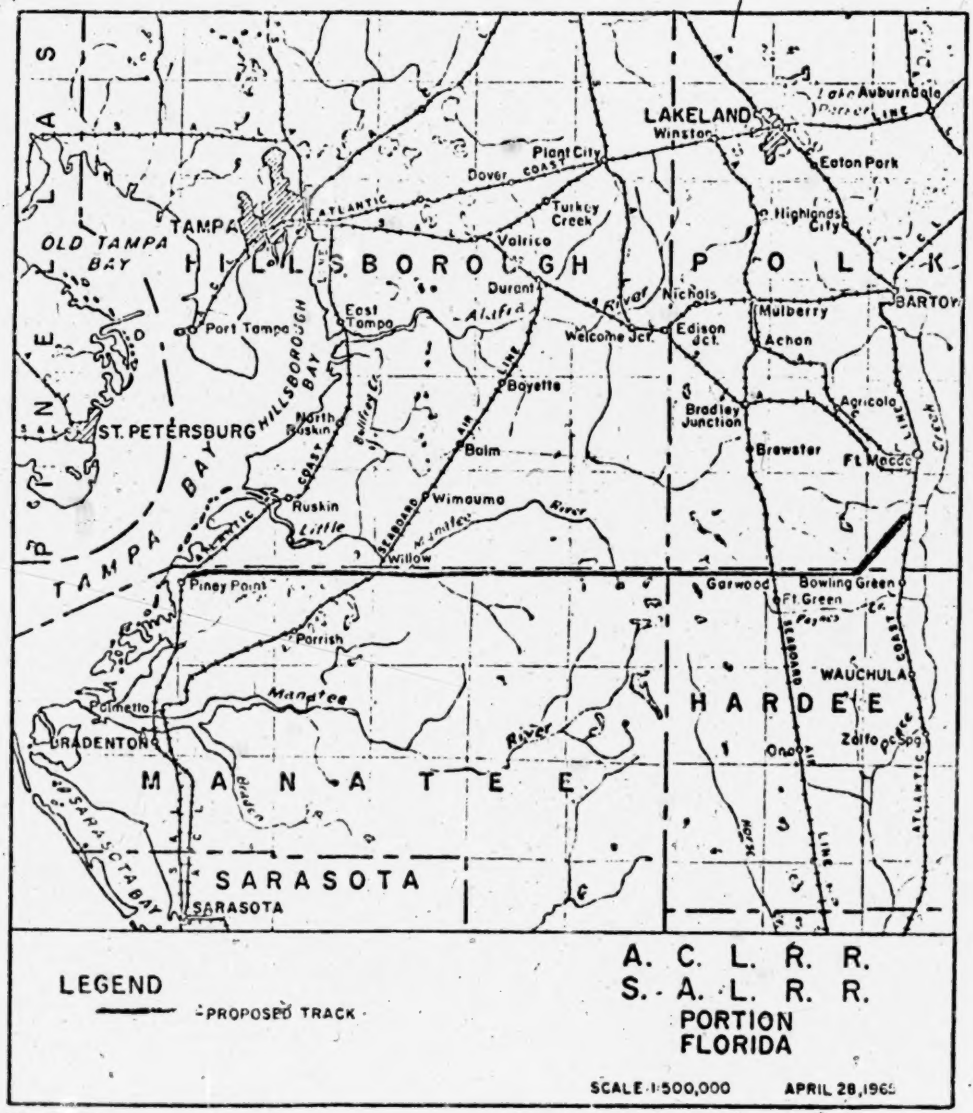
Represents one-eighth of total obligation of $387,336 guaranteed severally by the Company and other railroads.

Seaboard Air Line Railroad Company, together with other proprietary companies of Trailer Train Company, is obligated to advance to Trailer Train Company under certain conditions such sums as may be needed by that Company to pay principal and interest under terms of certain of its outstanding obligations.

No. F. D. 23688

APPENDIX B

Appendix B.



68-F-70

ATLANTIC COAST LINE RAILROAD COMPANY
SEABOARD AIR LINE RAILROAD COMPANY

ESTIMATE OF COST TO CONSTRUCT BRANCH LINE IN POLK HARDEE AND MANATEE COUNTIES, FLORIDA, FROM 6 MILES SOUTH OF FORT MEADE, FLA., TO PINEY POINT, FLA.-44.0 MILES

Account Number	Quantity	Unit Cost		Totals
1. Engineering				$ 309,511
2. Land for Transportation Purposes	1200 acres	Lump Sum		1,500,000
2½. Other right of Way Expenditures				
Rearrange Power Line & Telephone Line Crossings		Lump Sum		10,000
3. Grading				
Clearing & Grubbing	1,200 acres	$400.00	$ 480,000	
Excavation & Embankment	2,000,000 C.Y.	0.50	1,000,000	1,480,000
6. Bridges, Trestles & Culverts				
Open Deck Trestles (5)	1,000 L.F.	143.00	143,000	
Pipe Culverts: 24" to 68" Diam.	6,557 L.F.	Various	225,711	368,711
8. Ties				
Bridge & Trestles Ties - Creo.	93.197 MBM	121.92	11,363	
Crossing Ties - Creo.	3.888 MBM	127.17	494	
Crossties - Concrete	92.140 Ea.	12.41	1,143,457	
Switch Ties - Creo	7.838 MBM	127.17	997	1,156,311

F. D. No. 23688
Appendix C Sheet 2

Account Number	Quantity	Unit Cost		Totals
9. Rail				
115-lb. , New	7,950 G.T.	$ 135.00		$1,073,250
10. Other track Materials				
115-lb. Railroad Crossings-New	2 Ea.	5,250.00	$ 10,500	
115-lb. Angle Bars	11,920 Pair	8.00	95,360	
115-lb. Tie Plates	1,500 Ea.	1.37	2,055	
Fastenings	Lot		33,150	
115-lb. -#10 Turnouts	2 Ea.	1,760.00	3,520	144,585
11. Ballast				
Crushed Stone	90,000 C.Y.	1.50		135,000
12. Track Laying & Surfacing				
115-lb. Rail	44.0 Miles	10,560.00	464,640	
Placing Railroad Crossings	2 Ea.	700.00	1,400	
Placing Turnouts	2 Ea.	400.00	800	466,840
13. Fences & Signs				
Mile Posts	44 Ea.	25.00	1,100	
Crossing Signs	38 Ea.	50.00	1,900	
Fencing	Lot		3,000	6,000
26. Communication System				
Telephone Line		Lump Sum		55,000
27. Signals & Interlockers				
Flashing Light Signals	6 Sets		93,000	
SAL-ACL Crossing, Garwood			32,000	
SAL-ACL Crossing, Willow			27,000	
Power Switch at X-Line Jct.			29,500	
Power Switch at ZA-Line Jct.			49,500	231,000

Account Number	Quantity	Unit Cost		Totals
39. Public Improvements - Construction.				
Road Crossings	21 Ea.	$ 500.00		$ 10,500
Contingencies				352,292
Total Cost of Branch Line				7,300,000

ESTIMATE OF COST TO CONSTRUCT THREE 150-CAR PASS TRACKS ON BRANCH BETWEEN A POINT 6 MILES SOUTH OF FORT MEADE, FLA., TO PINEY POINT, FLA.

1. Engineering				$ 15,000
3. Grading				
Excavation & Embankment	70,000 C.Y.	0.50		35,000
8. Ties				
Switch Ties, Creo.	28,494 MBM	127.17	$ 3,624	
Crossties, concrete	9,324 Ea.	12.41	115,711	119,335
9. Rail				
115-lb. Rail	34 G.T.	135.00	4,590	
100-lb. Rail	679 G.T.	135.00	91,665	96,255
10. Other Track Materials				
115-lb. #10 Turnouts	6 Ea.	1,760.00	10,560	
115-lb. Angle Bars	54 Pair	8.00	432	
Compromise Joints	12 Ea.	70.00	840	
100-lb. Angle Bars	1,170 Pair	5.66	6,622	
Rail Anchors	2,400 Ea.	0.40	960	
115-lb. Tie Plates	900 Ea.	1.37	1,233	
Fastenings	Lot		2,730	22,777

Account Number		Quantity	Unit Cost		Totals
11.	Ballast				
	Crushed Stone	8,700 C.Y.	$ 1.50		$ 13,050
12.	Track Laying & Surfacing				
	115-lb. & 100-lb. Rail	4.5 Miles	19,560.00	$47,520	
	Placing Turnouts	6 Ea.	350.00	2,100	49,620
	Contingencies				18,963
	Total Cost to Construct 3 Pass Tracks				370,000
	Grand Total				$7,670,000

APPENDIX D

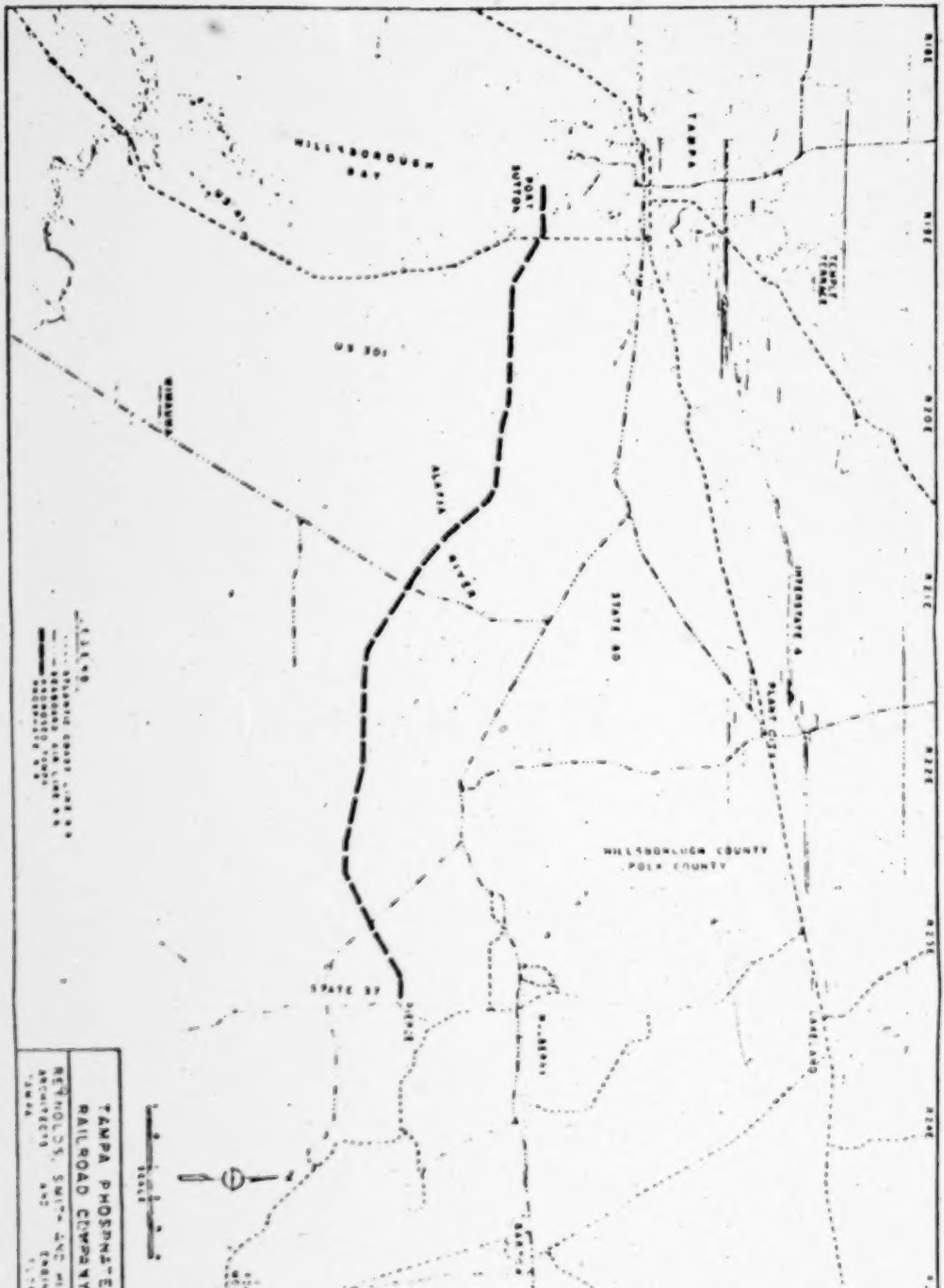
ESTIMATED TONNAGE[1] AND GROSS REVENUES EXPECTED TO BE DERIVED BY COAST LINE AND SEABOARD FROM TRAFFIC TO BE HANDLED OVER THE PINEY POINT LINE FOR THE FIRST FIVE YEARS OF OPERATION

	Phosphate rock		Superphosphate		Defluorinated Phosphate		Totals	
	Tons	Revenue	Tons	Revenue	Tons	Revenues	Tons	Revenues
First year	4,608,243	$5,299,478	708,434	$1,459,373	53,000	$109,180	5,369,677	$6,868,031
Second year	5,377,604	6,184,245	767,841	1,581,752	65,000	133,900	6,210,445	7,899,897
Third year	5,639,266	6,485,156	920,707	1,896,656	76,000	156,560	6,635,973	8,538,372
Fourth year	6,052,994	6,960,944	981,414	2,021,714	90,000	185,400	7,124,408	9,168,058
Fifth year	6,397,770	7,257,435	1,019,200	2,099,552	102,000	210,120	7,518,970	9,667,107

[1] In net tons of 2,000 pounds

Estimates by Coast Line and Seaboard of Annual Net Railway Operating Income (Before Provisions for Income Taxes) From First Year Operations of Piney Point Line.

Item	Coast Line	Seaboard	Combined Coast Line - Seaboard
Railway Operating Revenues			
Total operating revenues	$3,441,636	$3,426,392	$6,868,031
Assignable to line	2,135,879	2,202,827	4,338,709
Assignable beyond line	1,305,757	1,223,565	2,529,322
Railway Operating Expenses			
On line	1,639,615	1,326,220	2,965,835
Beyond line	652,879	622,783	1,268,662
Total operating expenses	2,292,494	1,938,003	4,230,497
Net Revenues from Operations	1,149,142	1,488,389	2,637,534
Railway Taxes			
Payroll	42,175	42,279	84,454
Ad valorem	5,004	3,854	8,858
Total tax accruals	47,179	46,133	93,312
Net Railway Operating Income	1,101,963	1,442,256	2,544,222
Lease Rent, Port Facilities			749,440
Net After Lease Rent			1,794,782


HILLSBOROUGH COUNTY
POLK COUNTY
STATE ST
TAMPA PHOSPHATE
RAILROAD COMPANY

F. D. No. 23688
Appendix G

APPENDIX G

TAMPA PHOSPHATE RAILROAD COMPANY:
ESTIMATED COST OF CONSTRUCTION

DESCRIPTION	ESTIMATED COST
ROAD	
Engineering and surveying	$ 560,000
Land	484,000
Other right-of-way expenditures	25,000
Grading	597,200
Bridges, Trestles, and Culverts	351,200
Ties	1,063,425
Rail	1,042,210
Other track material	84,597
Ballast	484,995
Track laying and surfacing	935,310
Fences and signs	1,790
Communication system (radio)	15,200
Signals and interlockers	142,275
Public improvements - construction:	
Road crossing grade	13,375
Overpasses	500,000
Sub-Total	6,300,577
Contingencies	492,823
Total - Road	6,793,400
EQUIPMENT	
Locomotives, general purposes - 5	1,000,000
Cabooses - 2	25,000
Total - Equipment	1,025,000
OFFICE EQUIPMENT	3,000
STRUCTURES	
Roadway building	15,000
Engine track and pit	10,000
Total	25,000
Total Estimated Cost	7,846,400

PROJECTED INVESTMENT [illegible]

First year of operation, Tamahua Line

Railway Operating Revenues	$4,110,000	
Railway Operating Expenses	1,548,000	
Net Revenue		$2,562,000
Railway Tax Accruals	651,236	
Railway Operating Income		1,910,764
Equipment Rents, Net	918,000	
Net Railway Operating Income		992,764
Interested on Funded Debt	406,800	
Interest on Unfunded Debt	48,000	
Total Fixed Charges	454,800	
Net Income		537,964
Total Investment, Road and Equipment	7,846,400	
Return on Investment Before Fixed Charges	12.7%	
Return on Investment After Fixed Charges	6.9%	

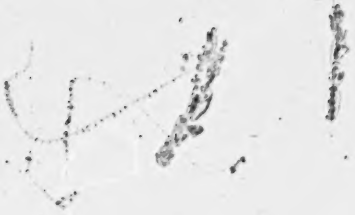


EXHIBIT B

DECISION AND ORDER

SERVICE DATE
AUGUST 7, 1967

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C. on the 28th day of July, 1967.

Finance Docket No. 23688

ATLANTIC COAST LINE RAILROAD CO. AND SEABOARD AIR LINE RAILROAD CO. CONSTRUCTION BETWEEN PORT MEADE AND PINEY POINT, FLA.

Finance Docket No. 23718

TAMPA PHOSPHATE RAILROAD CO. CONSTRUCTION IN HILLSBOROUGH AND POLK COUNTIES, FLA.

Upon consideration of the applications and the record in the above-entitled proceedings; the report and recommended order of the hearing examiner served in these proceedings on September 9, 1966; the order of the Commission, Division 3, dated February 8, 1967, granting, among other things, petitions for oral argument; the exceptions to the report and recommended order of the hearing examiner by applicants, protestants, and intervenors; the replies thereto filed by the parties; the joint petition and motion for dismissal in Finance Docket No. 23688, filed by Tampa Port Authority, Greater Tampa Chamber of Commerce and City of Florida, protestants, and the Tampa Phosphate Railroad Company, intervenor-protestant; the motion

by Tampa Phosphate Railroad Company, applicant in Finance Docket No. 23718, for the rescheduling or oral argument; and the joint replies thereto by Atlantic Coast Line Railroad Co. and Seaboard Air Line Railroad Co., now Seaboard Coast Line Railroad Company, applicants in Finance Docket No. 23688;

It appearing, That in Finance Docket No. 23688, as a result of the decision in *State of Florida* v. *Manatee County Port Authority*, 193 So. 2d 162, invalidating the proposed bond issue by the Manatee County Port Authority, the proceeds to be used for the construction of port facilities, including phosphate terminal and transfer facilities at Piney Point, Florida, no basis remains for indefinite postponement or future consideration of the proceeding on the existing record at such time as a new plan for the proposed construction is formulated which would involve delay for an extended period of time; and, that the proceeding having become moot otherwise as a result of the said decision by the Supreme Court of Florida, the petition and motion for dismissal should be granted;

It further appearing, That in Finance Docket No. 23718, the findings and conclusions of the hearing examiner on matters of fact and law considered and disposed of in his report and recommended order are in all material respects proper and correct; that the exceptions and replies raise no new or material questions of fact or law not adequately considered and properly disposed of by the hearing examiner; and that the exceptions, replies and the request for rescheduling oral argument are not of such a nature as to require the

issuance of a report discussing the evidence in the light of such pleadings and request.

Wherefore, and good cause appearing therefor:

We find, That in Finance Docket No. 23718, the evidence considered in light of the exceptions and replies does not warrant a result different from that reached by the hearing examiner and that the statement of facts, conclusions and findings of the hearing examiner, being proper and correct in all material respects, should be affirmed; and, that the order of February 8, 1967, setting the proceedings herein for oral argument, which would serve no useful purpose, should be vacated and set aside;

It is ordered, That the order of the hearing examiner served September 9, 1966, denying the application for authority to construct approximately 30 miles of railroad by the Tampa Phosphate Railroad Company in Hillsborough and Polk Counties, Fla., be, and it is hereby, adopted as the order of the Commission.

It is further ordered, That the order entered herein, dated February 8, 1967, to the extent oral argument is granted, be, and it is hereby, vacated and set aside.

It is further ordered, That the petition and motion for dismissal of the application in Finance Docket No. 23688, be, and they are hereby, granted, and the application for authority to construct approximately 44 miles of railroad jointly by the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad

Company (now Seaboard Coast Lines Railroad Company) be, and it is hereby, dismissed.

By the Commission, Division 3.

A true copy:

(SEAL)

H. NEIL GARSON,
Secretary.

/s/ H. NEIL GARSON
SECRETARY OF THE INTERSTATE
COMMERCE COMMISSION

This Page Left Blank Purposely

ORDER

In the Circuit Court of the
Tenth Judicial Circuit in and for
Polk County, Florida

Tampa Phosphate Railroad Company,
a Florida corporation,
Petitioner,

versus Case No. 18186-31-324

Seaboard Coast Line Railroad Company,
a Virginia corporation,
Mercantile-Safe Deposit and Trust Company,
a Maryland corporation,
and C. E. Heinmuller,
Defendants.

THIS CAUSE came on for hearing on September 22, 1967, on,

a) motion of Petitioner for leave to file an Amended Petition amending paragraphs 8 and 9 of the petition on account of the changed description of the proposed points of crossing, and by reason of such change to dismiss the proceeding as to the defendant, International Minerals & Chemical Corporation, and amending paragraph 1 of the petition to allege that Petitioner will be a common carrier in the intrastate transportation of phosphate rock and all products thereof for any shipper desiring such transportation;

b) motion of defendants Seaboard Air Line Railroad Company (now Seaboard Coast Line Railroad Company), Mercantile-Safe Deposit and Trust Company, and C. E. Heinmuller, for leave to amend their answer by adding thereto an Eighth Defense, alleging the decision and order of the Interstate Commerce Commission, dated July 28, 1967, served August 7, 1967, finding that the Petitioner's proposed operation would be in interstate commerce;

c) oral motion of the Petitioner to strike the Eighth Defense, if such leave to file is granted, and also to strike the Third and Fourth Defenses in the answer of the defendants Seaboard Air Line Railroad Company (now Seaboard Coast Line Railroad Company), Mercantile-Safe Deposit and Trust Company and C. E. Heinmuller, on the ground that the question whether the Petitioner's proposed operation is in intrastate or interstate commerce is raised by the Second and Fifth Defenses, and that the finding by the Interstate Commerce Commission that the Petitioner's operation will be in interstate commerce, upon which the Third, Fourth and Eighth Defenses are based, is not binding on this Court and constitute no defense to the petition; and

d) renew motion of defendants Seaboard Air Line Railroad Company (now Seaboard Coast Line Railroad Company), Mercantile-Safe Deposit and Trust Company and C. E. Heinmuller for summary judgment in their favor as a result of the decision of the Interstate Commerce Commission dated July 28, 1967, served August 7, 1967, (i) adopting the Examiner's

Proposed Report in which it was found that the Petitioner's proposed operation would be in interstate commerce, and (ii) denying the Petitioner's application for authority to construct its proposed line of railroad; and,

Upon all the pleadings and proceedings heretofore had herein, and the Court having heard argument of counsel, and being fully advised in the premises, it is,

ORDERED AND ADJUDGED

1. That the motion of the Petitioner for leave to file the Amended Petition be and the same is hereby granted, and that the action as to the International Minerals & Chemical Corporation be and the same is hereby dismissed;

2. That the motion of the defendants Seaboard Air Line Railroad Company (now Seaboard Coast Line Railroad Company), Mercantile-Safe Deposit and Trust Company and C. E. Heinmuller for leave to amend their answer by adding an additional Eighth Defense be and the same hereby is granted, and the answer of said defendants, as so amended, shall stand as the answer to the Amended Petition;

3. Ruling on Petitioner's oral motion to strike Third, Fourth, and Eighth Defenses in said answer as so amended is deferred until the taking of testimony herein.

Before submitting the question of compensation to a jury, the Court should determine, after a full hearing, whether under the facts in this case the plaintiff may construct its railroad line and facilities without a certificate of convenience and necessity. In this area, it appears to the Court that there may be a genuine issue as to these material facts.

4. Therefore, ruling on defendants' motion for summary judgment is deferred until all the facts material to Petitioner's right to eminent domain are before the Court.

The trial for this purpose is set before the undersigned Judge at 9:30 a. m., on the 18th day of Dec., 1967, in Chambers at Bartow, Polk County, Florida.

DONE AND ORDERED in Chambers at Bartow, Polk County, Florida, this the 6th day of October, 1967.

(Signed) GUNTER STEPHENSON
GUNTER STEPHENSON,
CIRCUIT JUDGE

ORDER GRANTING PRELIMINARY INJUNCTION INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Number and Title Omitted)

Filed: Dec. 14, 1967

THIS CAUSE was heard upon Notice, Memoranda of Law and argument of counsel and is now for decision upon application for a Preliminary Injunction.

The Complaint makes the following case: the Plaintiff, SEABOARD COASTLINE RAILROAD COMPANY hereinafter called "Seaboard" or "Plaintiff", is a Virginia corporation, engaged in business in Florida and elsewhere as a common carrier by railway in interstate and intrastate commerce and is subject to the Interstate Commerce Act. A portion of Plaintiff's line of railroad is located in Polk County, Florida, and the Plaintiff is doing business in said county. Defendant, TAMPA PHOSPHATE RAILROAD COMPANY, hereinafter called "Tam-Phos" or 'Defendant", is a Florida corporation, organized to conduct and carry on business as a common carrier by railroad. It has no existing line of railroad but proposes to construct and operate a new line of railroad between the Port Sutton area in Hillsborough County, Florida, and a point near Pierce, Polk County, Florida. Defendant intends to utilize the proposed new line of railroad for the transportation of phosphate rock, and all products thereof, for the public desiring such transportation to the Port of

Tampa and movement beyond by water in coastwise, export and Panama Canal traffic.

On July 1, 1965, Defendant filed an application with the Interstate Commerce Commission for a Certificate of Public Convenience and Necessity under §1(18-20) of the Interstate Commerce Act (49 U. S. C. §1(18-20)), authorizing the construction and operation of the new line of railroad in Hillsborough County and Polk County, Florida. After hearing, on September 9, 1966, the Interstate Commerce Commission Hearing Examiner found that such proposed line of railroad would constitute an extension within the meaning of §1(18), that the I. C. C. had jurisdiction, that public convenience and necessity would not require the construction and operation of the line and such line would burden interstate commerce and that the application for a certificate should be denied. By decision and order dated August 7, 1967, the Interstate Commerce Commission approved and adopted the order of the Hearing Examiner. The Defendant has taken no action, judicially or administratively, to review, suspend, annul or modify the order of the Interstate Commerce Commission and Defendant has not obtained a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission.

On October 25, 1965, Defendant commenced an action in the nature of a condemnation proceeding in the Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida, No. 18186-31-324. After pleading and hearings said action now constitutes proceedings to condemn easements or rights-of-way for crossing

Plaintiff's railroad tracks at two separate places in Polk County, Florida. Proceedings in said court, including the taking of depositions, include a trial scheduled to commence on December 18, 1967.

If Defendant is successful in the condemnation action, it could attempt to invade Plaintiff's sources of traffic and revenue and in the event Defendant thereafter was found to be subject to the provisions of the Interstate Commerce Act, it would have acquired property of Plaintiff which would be held by it for non-railroad purposes, whereupon Plaintiff would be put to great trouble and expense in re-acquiring title to the parcels sought to be condemned.

Defendant filed a Motion to Dismiss the Complaint on the grounds that the Court is without jurisdiction over the subject matter, that 28 U. S. C. 2283 expressly prohibits a court of the United States from granting an injunction to stay proceedings in a state court, and that the Complaint fails to state a claim upon which relief can be granted. In support of its motion, Defendant submitted an affidavit of one of its counsel. Atached to the Complaint as an exhibit is a copy of the report and a recommended order by the Interstate Commerce Commission Hearing Examiner. The authenticity of the report and decision, as attached to the Complaint, was stipulated although Defendant disputes the effectiveness thereof contending that its activities would not be in interstate commerce. By stipulation there was submitted for consideration by the Court the original file in the Polk County Circuit Court proceedings, No. 18186-31-324, and exemplified copies

of condemnation proceedings pending in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, Nos 46, 887-L and 46-888-L, respectively.

The Court finds the facts to be as above alleged, together with those hereinafter set out: The Eastern terminus of Defendant's proposed line would be at or near Pierce, Florida, where a proposed connection with the South Pierce Railroad would be made. The terrain to be traversed by the line is generally level, with some hilly areas. The eastern and central portions would cross undeveloped phosphate reserve lands and pasture lands, with some wooded areas and farms. The area immediately adjacent to the western terminus is being developed industrially. No urban areas would be traversed. The line would cross, successively from the east, Plaintiff's Boca Grande branch, State Highway 37, Plaintiff's line between Edison and Bradley, State Highway 39, Plaintiff's Sarasota branch, the Alafia River, U. S. Highway 301, and another one of Plaintiff's Sarasota branches. In addition, some twenty-five rural roads and several small streams would be traversed. The right-of-way is roughly paralleled to the north by State Highway 60. Defendant proposes to acquire a one hundred foot right-of-way, primarily from large ownerships, with some small ownerships west of the Alafia River. The roadbed will be twenty-four feet, shoulder to shoulder, with side ditches averaging four feet in depth. There will be a single main line. Defendant's proposed line will be a substantial extension (thirty miles) that would involve expenditure of a significant sum ($7,800,000.00). It would extend into

territory presently served by other railroads and not now served by Defendant. The proposed new trackage, if constructed, would constitute an extension and would not be a spur, industrial, team, switching, or side-track.

Plaintiff has been serving and continues to serve the phosphate industry in the transportation of phosphate rock and allied products thereof in the areas sought to be served by Defendant. As such, Defendant's proposed line of railroad would be competing with that of Plaintiff.

The Court makes and sets forth the following CONCLUSIONS OF LAW:

(A) This Court has jurisdiction of this cause of action. 28 U. S. C. §89(b), 28 U. S. C. §1337; 49 U. S. C. §1(18) (19) (20).

(B) The provisions of Title 28, 2283 are not applicable or controlling in this case.

(C) The proposed new trackage, if constructed, would constitute a new line of railroad and would not constitute a spur, industrial, team, switching, or side-track. 49 U. S. C. §1. Par 18 and Par. 22.

(D) Under the statutes, this Court has no concern with and no right to consider whether public convenience and necessity require or would be furthered by the proposed track, and any factors bearing on convenience or necessity of the public are irrelevant to the question that is involved in this case.

(E) Plaintiff is a party in interest within the meaning of Title 49 §1, Par. 20, U. S. C., and is entitled to maintain this action.

(F) Plaintiff is entitled to a preliminary injunction as prayed in its complaint and a preliminary injunction should issue.

WHEREUPON, it is considered, ordered, adjudged and decreed by the Court as follows:

1. Until further Order of this Court, the Defendant, TAMPA PHOSPHATE RAILROAD COMPANY, its servants, agents and employees are hereby enjoined from proceeding with any condemnation of Plaintiff's properties and from undertaking the proposed construction or operation of its line, or from constructing or operating a new line of railroad over or across the Plaintiff's properties, or from acquiring Plaintiff's properties for such purpose and without limiting the generality of the foregoing, they are enjoined specifically from taking any further steps in connection with said condemnation proceedings relating to lands or properties of Plaintiff's, unless, until, a Certificate of Convenience and Necessity is granted by the Interstate Commerce Commission authorizing extension or construction of its lines pursuant to 1(18) of the Transportation Act of 1920.

2. This Order shall not become effective until a bond in the sum of $50,000.00 has been executed by the Plaintiff, with corporate surety, to be approved by the Clerk of this Court, payable to TAMPA PHOSPHATE RAIL-

ROAD COMPANY, conditioned to pay such costs and damages as may be incurred or suffered by TAMPA PHOSPHATE RAILROAD COMPANY as a result of the issuance of this Order should it finally be determined that Plaintiff is not entitled to the relief sought. The Court retains jurisdiction for the purpose of adjusting the amount of the bond upon a showing, after notice to the opposite party, that the said bond is excessive or inadequate.

3. The injunction provided by this Order shall become effective upon the posting by the Plaintiff of the aforesaid bond.

4. As soon as this case is at issue, the Court will set it for trial on the merits as promptly as possible.

DONE and ORDERED at Tampa, Florida, this 14 day of December, 1967.

(Signed) BEN KRENTZMAN
United States District Judge

Bond filed and approved
this 14th day of December,
1967.
WESLEY R. THIES, CLERK BY:
/s/ ROBERT H. COOKE
Deputy Clerk

ORDER

(Number and Title Omitted)

Filed: April 22, 1968

This cause came on to be heard upon defendant's Motion to Dissolve and Vacate Preliminary Injunction and upon that portion of plaintiff's Motion to Strike directed to the First Defense of defendant's Answer. After consideration of the briefs and argument of counsel upon notice of hearing, and the Court being duly advised in the premises it is hereby

Ordered and Adjudged as follows:

1. That the First Defense of defendant's Answer be and the same is hereby stricken.

2. Defendant's Motion to Dissolve and Vacate Preliminary Injunction be and the same is hereby denied.

Done and Ordered in Chambers, in Tampa, Hillsborough County, Florida, this 22 day of April, 1968.

(Signed) BEN KRENTZMAN
UNITED STATES
DISTRICT JUDGE

NOTICE OF APPEAL

Filed: May 17, 1968

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SEABOARD COAST LINE RAILROAD COMPANY,
Plaintiff,
-vs- No. 67-486 Civ. T.

TAMPA PHOSPHATE RAILROAD COMPANY,
Defendant.

NOTICE is hereby given that Tampa Phosphate Railroad Company, Defendant above named, pursuant to 28 U.S.C. Section 1292, hereby appeals to the United States Court of Appeals for the Fifth Circuit from that part of the Order entered in this action on April 22, 1968, denying defendant's motion to dissolve and vacate the preliminary injunction which stayed the condemnation proceedings in the state courts.

Dated at Tampa, Florida
May 17, 1968

(Signed) JAMES B. McDONOUGH, JR.
James B. McDonough, Jr.
(Signed) DAVID C. G. KERR
David C. G. Kerr
of Macfarlane, Ferguson,
Allison and Kelly
Attorneys for Defendant
P. O. Box 1531
512 Florida Avenue
Tampa, Florida

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26,424

TAMPA PHOSPHATE RAILROAD COMPANY

Appellant

VERSUS

SEABOARD COAST LINE RAILROAD COMPANY

Appellee

AFFIDAVIT PURSUANT TO 28 U.S.C. SECTION 2108

SUBMITTED BY APPELLANT

STATE OF FLORIDA)

SS

COUNTY OF HILLSBOROUGH)

W. JUDSON McCLAIN, being duly sworn, deposes and says:

1. I have been employed by the engineering firm of J. E. Greiner Company as an engineer for over thirty years and have been and am presently so employed in the Tampa office of that organization, where I have been for the last five years.

2. J. E. Greiner Company has acted as consulting engineers for railroads on a number of projects, including employment by the Georgia, Florida and Southern Railway Company (a subsidiary of the Southern Railway Company) in opposition to the proposed construction by the Duval Connecting Railroad Company in Duval County, Florida. Deponent is familiar with labor and material costs in October of 1965, and is generally familiar with railway operating practices and requirements at railroad grade crossings.

3. Deponent has examined the drawings of the proposed two points of crossing of the line of the Seaboard Coast Line Railroad Company, one being on the railroad's Achan Subdivision, and the other on the railroad's Boca Grande Subdivision, by the Tampa Phosphate Railroad Company as described in the original condemnation petition filed October 26, 1965, in the Polk County action (A. 349-350, and 351-352), and as such proposed points of crossing were relocated and described in the amended petition filed September 29, 1967, in the Polk County action (A. 410-411, and 411-412).

4. The amended petition in the Polk County action refers to the employment of the J. E. Greiner Company to relocate the proposed line of the Tampa Phosphate Railroad Company, such relocation being made necessary by the mining operations of the International Minerals & Chemical Corporation (A. 409), and I have attached hereto, as Exhibit 1, a copy of the map or plat prepared by the J. E. Greiner Company, showing realignment of the line in Polk County and the points of crossing of the Achan Subdivision and the Boca Grande Subdivision, to which I have also attached prints, marked Exhibit A and Exhibit B, showing the points of crossing in more detail.

5. In accordance with the requirements of modern railroad operation, it will be necessary to provide adequate automatic interlocking with signals so that the first approaching train of either railroad may proceed through the railroad grade crossings without stopping.

6. I have set out below an approximate cost estimate of the automatic interlocking installation that will be the minimum re-

quired upon the construction of these two railroad grade crossings, the respective cost of which installed on the Appellee's property, I am advised by counsel for the Tampa Phosphate Railroad Company, would be included in the damages recoverable by the Seaboard Coast Line Railroad Company in the Polk County Action, to-wit:

Wayside Equipment and Materials		*Approximate Cost Installed*
2 Home Relay Control Houses		$23,000
8 Track Circuits-Approach/Home		12,000
8 Approach Relay Control Cabinets		30,000
16 Home and Approach Signals, Two Color Each		11,000
10 Batteries		1,000
Track Work, Bonding, Joint Insulation, Rectifiers, and Connections	Lot	5,000
Power Supply and Wiring	Lot	13,000
APPROXIMATE TOTAL INSTALLED COSTS		$95,000
Portion Installed on the Seaboard Coast Line Railroad		$47,500

Dated at Tampa, Florida
October 26, 1968

/S/ W. JUDSON McCLAIN

W. JUDSON McCLAIN

Sworn to and subscribed before me this 26th day of October, 1968, at Tampa, Hillsborough County, Florida.

/S/ SANDRA P. KINLEY

Notary Public
State of Florida at Large

My Commission Expires:
January 3, 1971

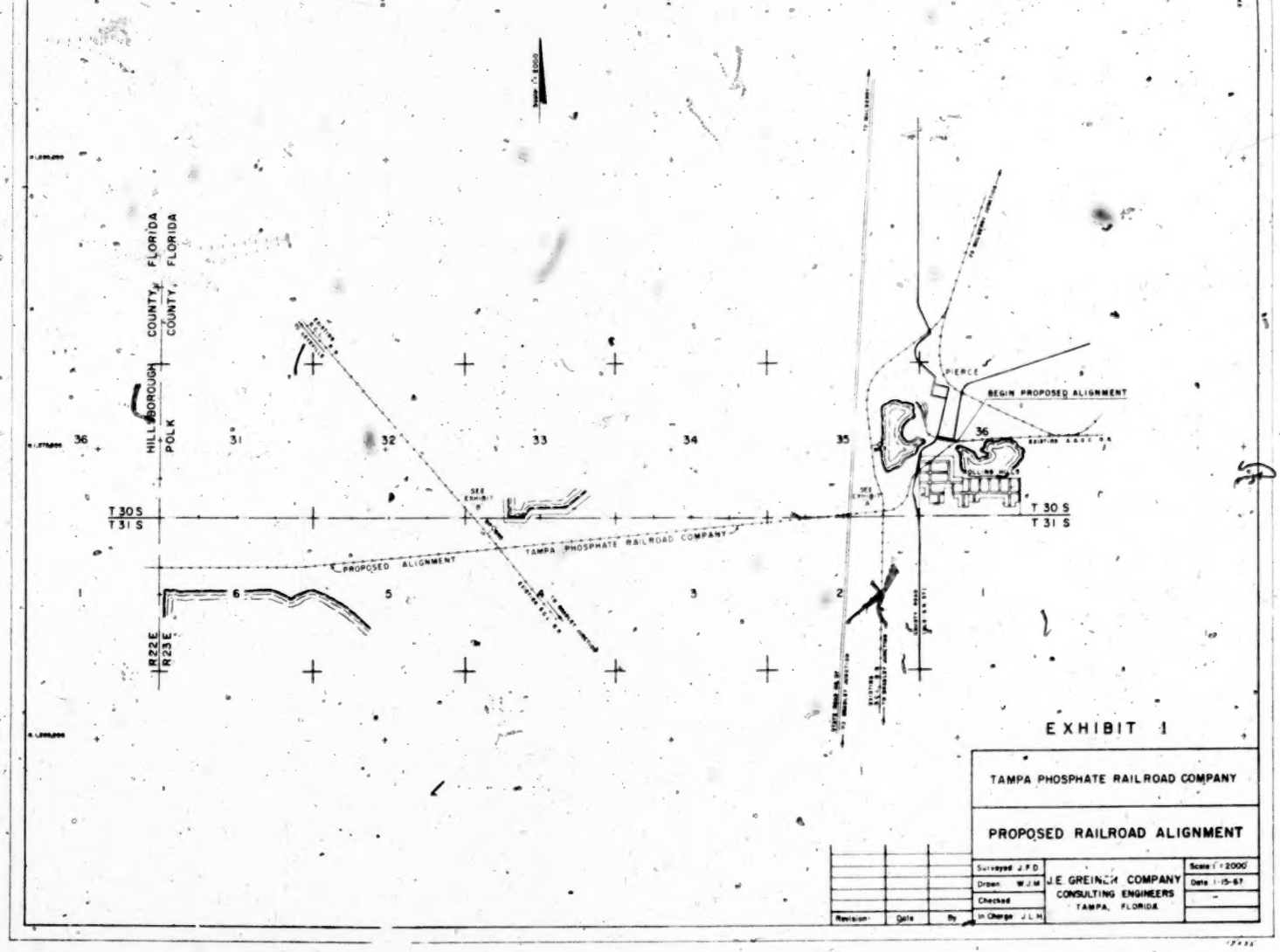


EXHIBIT 1

TAMPA PHOSPHATE RAILROAD COMPANY

PROPOSED RAILROAD ALIGNMENT

Surveyed J.F.D.	J.E. GREINER COMPANY CONSULTING ENGINEERS TAMPA, FLORIDA		Scale 1" = 2000'	
Drawn W.J.M.			Date 1-15-67	
Checked				
In Charge J.L.H.				
Revision	Date	By		

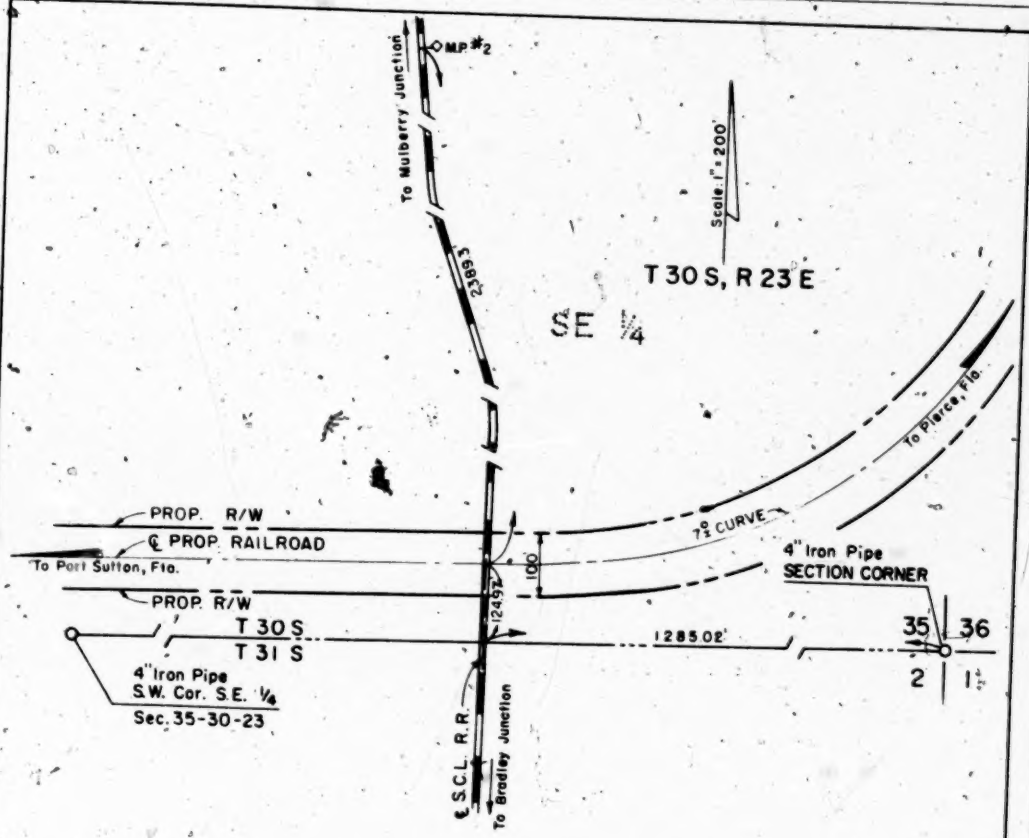


EXHIBIT "A"
POLK COUNTY, FLORIDA

DESCRIPTION: PROPOSED RAILROAD EASEMENT

A 100 FOOT Railroad Easement across that part of a SEABOARD COAST LINE Railroad Right-of-Way lying in the Southeast one-quarter of Section 35, Township 30 South, Range 23 East, POLK COUNTY, Fla.; being more particularly described as follows:

Commence at the Southeast corner of said Section 35: Thence Westerly along the South boundary of said Section 35 a distance of 1285.02 feet to a point on the centerline of the existing SEABOARD COAST LINE Railroad; thence Northerly along the said centerline of the existing railroad a distance of 1249.7 feet to a point on the centerline of the PROPOSED 100 FOOT RAILROAD EASEMENT, the said proposed centerline lying 2389.3 feet Southerly of SEABOARD COAST LINE Railroad Mile Post No. 2.

EXHIBIT "A"

TAMPA PHOSPHATE RAILROAD COMPANY

RAILROAD EASEMENT

J. E. GREINER COMPANY
CONSULTING ENGINEERS — TAMPA, FLORIDA
SCALE: 1" = 200' — J.L.H. — SEPT. 14, 1967

Revised 11-28-67

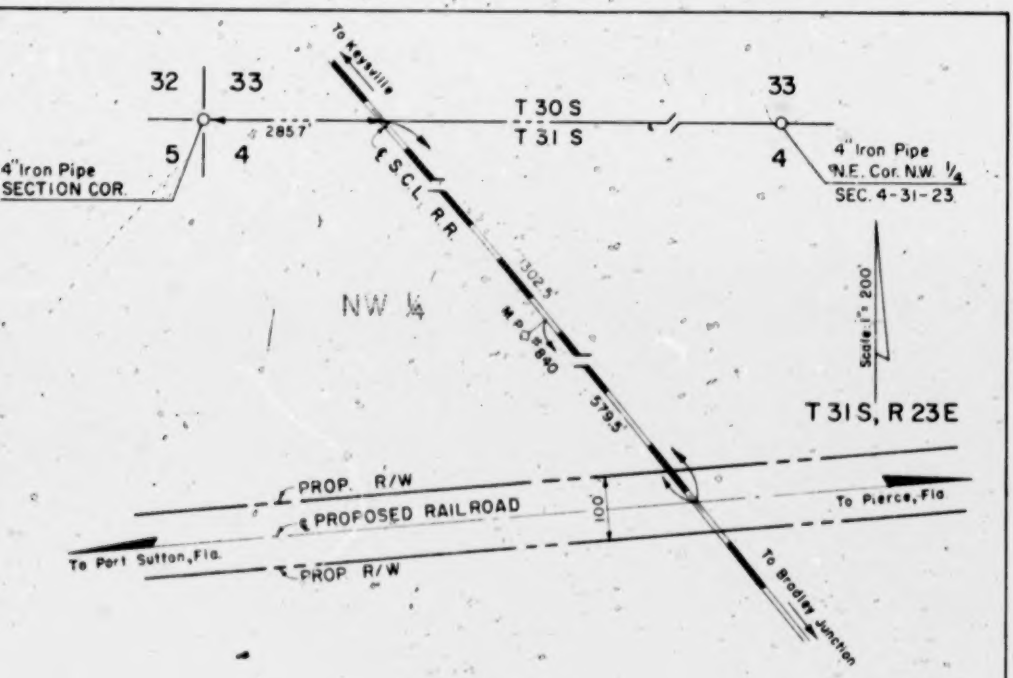


EXHIBIT "B"
POLK COUNTY, FLORIDA

DESCRIPTION: PROPOSED RAILROAD EASEMENT

A 100 FOOT Railroad Easement across that part of a SEABOARD COAST LINE Railroad Right-of-Way lying in the Northwest one-quarter of Section 4, Township 31 South, Range 23 East, POLK COUNTY, Fla.; being more particularly described as follows:

Commence at the Northwest corner of Section 4; thence Easterly along the North boundary of said Section 4 a distance of 285.7 feet to a point on the centerline of the existing SEABOARD COAST LINE Railroad; thence Southeasterly along the said centerline of the existing railroad a distance of 1302.5 feet to a point on the centerline of the PROPOSED 100 FOOT RAILROAD EASEMENT; the said proposed centerline lying 579.5 feet Southeasterly of SEABOARD COAST LINE Railroad Mile Post No. 840.

EXHIBIT "B"

TAMPA PHOSPHATE RAILROAD COMPANY
RAILROAD EASEMENT
J. E. GREINER COMPANY CONSULTING ENGINEERS TAMPA, FLORIDA SCALE: 1" = 200' J.L.H. SEPT. 14, 1967

Revised 11-28-67

BEFORE THE

INTERSTATE COMMERCE COMMISSION

In Re: Application of Rates on Movements of Phosphate Rock from Mines in Florida to Sutton, Florida

---

PETITION FOR DECLARATORY ORDER

Comes now Seaboard Coast Line Railroad Company, and hereby petitions for a declaratory order as authorized by Section 5(d) of the Administrative Procedure Act, 5 U.S.C. 554(e), and in support of its petition states:

(1) That your petitioner is a Class I common carrier by railroad subject to the Interstate Commerce Act and under the jurisdiction of this Honorable Commission.

(2) That International Minerals and Chemical Corporation is a customer of this railroad originating phosphate rock traffic at mines at Imroc, Noralyn, Prairie, West Polk, Pierce, and Clear Springs, Florida. This rock is tendered to the railroad at these mining points and transported to Sutton, Florida.

(3) That at Sutton, Florida, the rock is loaded aboard vessels for further transportation. The rock may be dried (40% of the rock shipped is "wet rock"). It may also

be blended with other grades of phosphate rock. One hundred per cent of it moves from Sutton via barge and ship. Eighty per cent of it moves to foreign destinations. None of it moves to points in Florida.

(4) That it is the crystal clear intent of the shipper at the time of the shipment to have the rock transported in a continuous movement from the mine to points outside the State of Florida, and, therefore, the movement is interstate or foreign commerce and subject to the jurisdiction of the ICC. Your petitioner has, therefore, been applying the rates in Southern Freight Tariff Bureau Freight Tariff 876-B, Florida Phosphate Rock Tariff ICC S-658 applicable to interstate commerce.

(5) That Tariff 876-B has application on both interstate and intrastate traffic. Formerly, the interstate and intrastate rates applicable to phosphate rock traffic moving to the port were the same. However, on August 19, 1967, the interstate rate was increased pursuant to Ex Parte 256, and on June 24, 1968, it was further increased pursuant to Ex Parte 259. The Florida Public Service Commission did not increase the intrastate rates accordingly and, therefore, there is now a difference in rates.

(6) International Minerals and Chemical Corporation, on May 26, 1969, filed a claim for charges of approximately $800,000, contending that the intrastate rate was applicable.

A copy of their claim is attached hereto and made a part hereof. On June 11, 1969, this railroad denied the claim.

(7) That sufficient controversy and confusion exists concerning the application of these rates so as to cause the Florida Public Service Commission to except this phosphate rock traffic when considering increases similar to those granted by the Interstate Commerce Commission in Ex Parte 256. The Florida Commission said in its order granting the increases: "It is the opinion of this Commission that it should not attempt to make any change in these particular rates until the parties have obtained some judicial determination concerning the nature of the transportation in question." A copy of the Florida Commission's order No. 4657 is attached hereto and made a part hereof.

(8) In ICC Finance Docket 23688 - Atlantic Coast Line Railroad Co. and Seaboard Air Line Railroad Co. Construction Between Port Meade and Piney Point, Fla., this Commission had an opportunity to consider the traffic involved. In that case the Tampa Phosphate Railroad Company contended that the Commission lacked jurisdiction over its application to construct a railroad to handle this traffic since the traffic was intrastate only. The Examiner's report, served September 9, 1966, and adopted by this Commission July 28, 1967, discusses this point on Sheets 37 through 39. The Commission found that there was no material break in the flow of commerce occasioned by drying or storage and that for regulatory purposes the traffic was interstate in character.

WHEREFORE, your petitioner respectfully states that there is an actual controversy between the parties as to the application of rates and, therefore, respectfully petitions this Honorable Commission to issue a declaratory order resolving this controversy and determining whether the interstate rate or the intrastate rate applies to this movement.

Respectfully submitted,

CHARLES B. EVANS
500 Water Street
Jacksonville, Florida 32202
ATTORNEY for SEABOARD COAST LINE
RAILROAD COMPANY

CERTIFICATE OF SERVICE

I hereby certify that I have today served the foregoing document upon V. J. Haan, General Traffic Manager, International Minerals & Chemical Corporation, Bartow, Florida, 33830, by mailing a copy thereof by prepaid, first class mail, properly addressed.

Charles B. Evans

Dated at:

Jacksonville, Florida
July 16, 1969

[illegible] LOLS

[illegible] MINERALS & CHEMICAL CORPORAT

July 23, 1969

Mr. E. E. Grant
Manager - Freight Revenues
Seaboard Coast Line Railroad Company
500 Water Street
Jacksonville, Florida 32202

Re: Claim for Overcharges [illegible]

Dear Mr. Grant:

This is a claim by International Minerals & Chemical Corporation (IMC) for overcharges arising out of the execution by you of certain excessive freight charges on phosphate rock shipped from IMC origin points in Polk County, Florida to Sutton (also known as Port Sutton), Florida.

This claim is filed pursuant to Chapter 353, Florida Statutes, 1967, and other applicable Florida law.

Transmitted with the claim are organized volumes of bills of lading and freight bills, in chronological or numerical sequence, and summary sheets affixed thereto, so that the nature of the overcharges and the amount of the overcharges will be readily determinable by you.

The basis for this claim is:

1. During the period August 19, 1967 through June 24, 1968, you charged, exacted and received from IMC for phosphate rock moving over your railroad in intrastate commerce from IMC origin points in Polk County to Sutton, a freight rate of 85¢ per net ton, whereas the applicable tariff during said period of time established a rate of 75¢ per net ton as per Items 1930, 1980, 1985, 1990, 1995 of SFTB Freight Tariff No. 876-B

[illegible] 27-10-83

[illegible] Seaboard Coast Line Railroad Company]
[illegible], 1969

[illegible] with the Florida Public Service Commission, applicable on intrastate commerce shipments within the State of Florida. The amount of overcharges during this period was $[illegible].

2. During the period June 28, 1988 to and including May 9, 1989 [illegible] freight billings will be included in subsequent claims), [illegible] charged, collected and received from I.M.C. for phosphate rock moving over your railroad in intrastate commerce from I.M.C. [illegible] points in Polk County to Sutton, a freight rate of 88¢ per net ton. Whereas the applicable tariff during said period of time established a rate of 75¢ per net ton as per Items 1010, 1080, 1085, 1090, 1095 of SFTB Freight Tariff No. 876-B as filed with the Florida Public Service Commission, applicable on intrastate commerce shipments within the State of Florida. The amount of overcharges during this period was $603,758.29.

The total amount of overcharges set forth above is $791,893.55.

Repayment of said overcharges is demanded.

International Minerals & Chemical Corporation agrees to protect the carrier and its connections against any loss resulting from non-surrender of original freight bill or bill of lading, or both.

Very truly yours,

INTERNATIONAL MINERALS & CHEMICAL CORPORATION

V. J. Hoan
General Traffic Manager

VJH:mh

Enclosures

cc: Mr. [illegible], [illegible], Bartow, Florida

Mr. R. W. Pauley, Jr., Skokie, Illinois

...r. L. L. Durham
Assistant Vice President
Seaboard Coast Line Railroad Company
500 Water Street
Jacksonville, Florida 32202

...r. T. H. Jones, Manager
Phosphate Sales & Service
Seaboard Coast Line Railroad Company
Post Office Box 295
Mulberry, Florida 33860

Mr. F. C. Almon, Jr.
Regional Sales Manager (Freight)
Seaboard Coast Line Railroad Company
Bankers Building
105 West Adams Street
Chicago, Illinois 60603

Mr. Lewis W. Pettigrew, General Counsel
Florida Public Service Commission
Whitfield Building
700 South Adams Street
Tallahassee, Florida 32304

179

SCI OVERCHARGE SUIT - SUTTON

Origin	Product	Total Tons	Total Freight Paid	Direct To Vessel	Intra-State Tons	Assessed Rate	Intra-State Freight Paid	Overcharge Per Ton	Overcharge
Prairie	Wet Rock	149,388.90	$ 126,965.28	0.0	149,388.90	85¢	$ 126,985.28	10¢	$ 14,9
Noralyn		507,198.40	431,317.92	0.0	507,198.40	85¢	431,317.92	10¢	
West Polk		195,559.70	166,225.88	0.0	195,559.70	85¢	166,225.88	10¢	
Acton		161,003.00	136,857.65	0.0	161,003.00	85¢	136,857.65	10¢	
Prairie	Dry Rock	135,070.74	114,810.33	3,272.39	131,798.35	85¢	112,028.60	10¢	
Noralyn		1,121,327.30	953,129.20	18,707.87	1,102,619.43	85¢	937,226.52	10¢	
West Polk		591,635.91	502,874.02	7,817.15	583,738.64	85¢	496,177.81	10¢	
SUB-TOTAL		2,861,150.03	$2,431,980.28	29,797.41	2,831,352.62		$2,406,650.86		$283

SCL OVERCHARGE SUIT - SUTTON

Dates Used	Origin	Product	Total Tons	Total Freight Paid	Direct To Vessel	Intra-State Tons	Assessed Rate	Intra-State Freight Paid	Overcharge Per Ton	Overcharge Total
6/25/68 - 12/31/68	Noralyn	Wet Rock	521,688.50	$ 459,085.82	0.0	521,688.50	88¢	$ 459,085.82	13¢	$ 67,[illegible]
	West Polk		451,720.55	397,514.12	0.0	451,720.55	88¢	397,514.12	13¢	58,723.67
	Achan		174,838.60	153,857.54	0.0	174,838.60	88¢	153,857.54	13¢	22,723.07
	Prairie	Dry Post	74,636.70	65,682.51	0.0	74,638.70	88¢	65,682.51	13¢	[illegible]
	Noralyn		769,692.51	677,767.84	871.16	768,751.35	88¢	676,501.19	13¢	99,[illegible]
	West Polk		234,[illegible].00	[illegible]	0.0	234,[illegible].00	88¢	206,[illegible].57	13¢	[illegible]
	SUB-TOTAL		2,227,504.66	$1,960,704.40	871.16	2,226,[illegible].70		$1,959,437.75		$[illegible]

180

181

SCL OVERCHARGE SUIT - SUTTON

Time Period	Origin	Product	Total Tons	Total Freight Paid	Direct To Vessel	Intra-State Tons	Assessed Rate	Intra-State Freight Paid	Overcharge Per Ton	Overcharge Total
1/1/68 - 5/9/68	Prairie	Wet Rock								
	Noralyn		187,270.50	$ 164,797.04	0.0	187,270.50	88¢	$ 164,797.04	13¢	$ 24,345.17
	West Polk		118,973.00	104,696.03	0.0	118,973.00	88¢	104,696.03	13¢	15,466.49
	Achan		186,013.20	163,691.56	0.0	186,013.20	88¢	163,691.56	13¢	24,181.72
	Clear Springs		267,098.00	235,046.24	0.0	267,098.00	88¢	235,046.24	13¢	34,722.74
	Prairie	Dry Rock	70,306.68	61,869.88	2,962.83	67,343.85	88¢	59,262.59	13¢	8,754.70
	Noralyn		516,559.70	454,572.46	0.0	516,559.70	88¢	454,572.46	13¢	67,132.78
	West Polk		347,113.49	305,459.89	3,480.15	343,633.34	88¢	302,397.34	13¢	44,679.33
	SUB-TOTAL		1,693,334.57	$1,490,133.10	6,442.98	1,686,891.59		$1,484,463.26		$219,295.91
5/[illegible]/67 - 6/24/68			2,861,150.03	$2,431,980.38	29,797.41	2,831,352.62		$2,406,650.86		$283,135.28
6/[illegible]/68 - 12/31/68			2,227,504.86	$1,960,204.40	871.10	2,226,633.70		$1,959,437.75		$289,452.39
1/1/69 - 5/9/69			1,693,334.57	$1,490,133.10	6,442.98	1,686,891.59		$1,484,463.26		$219,295.91
GRAND TOTAL			6,781,989.46	$5,882,317.88	37,111.55	6,744,877.91		$5,850,551.87		$791,883.58

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition, as amended, of Florida railroads seeking authority to increase certain Florida intrastate rates or charges for service,

DOCKET NO. 9010-RR

ORDER NO. 4657

The following Commissioners participated in the hearing and disposition of this cause:

WILLIAM T. MAYO, CHAIRMAN
JERRY W. CARTER
JESS YARBOROUGH

ORDER GRANTING CERTAIN INCREASES

BY THE COMMISSION:

The Commission previously considered the petitions herein and, after public hearing, entered Order No. 4324 on February 28, 1968 granting certain increases similar to those granted by the Interstate Commerce Commission in its Docket Ex Parte 256. One of the intervenors in this proceeding, International Minerals & Chemical Corporation, sought judicial review of said Order in the Supreme Court of Florida contending that the Order was based on insufficient evidence with respect to the separation of the property, revenues, and expenses of the carriers directly related to their intrastate operations. This Commission, itself, had pointed out the deficiency in the record before it, but based its decision on the record made before the Interstate Commerce Commission in said Ex Parte 256 proceeding. The Supreme Court agreed with International Minerals & Chemical Corporation and reversed the Commission. Thereafter, the railroads filed petitions requesting further hearings and an opportunity to provide the Commission with the necessary intrastate operating statistics to support their request for increases in intrastate rates and charges. A further public hearing was held and additional evidence was presented for consideration by the Commission.

There continues to be a controversy between one of the railroads, party to this proceeding, and International Minerals & Chemical Corporation with respect to the nature of the rail movement of certain phosphate traffic between the phosphate mines and plants in Polk County and the ports in the Tampa Bay area. The railroad in question contends that the movement of such traffic is interstate in nature, while the International Minerals & Chemical Corporation contends that it is intrastate in character. Interstate rates, which already carry the proposed increases, presently are being assessed on this traffic and the shipper is paying such increased rates. However, International Minerals & Chemical Corporation stated in open hearing before the Commission that it is the company's intention to seek a judicial determination of the question in an appropriate Federal court. It is the opinion of this Commission that it should not attempt to make any change in these particular rates until the parties have obtained some judicial determination concerning the nature of the transportation in question. The

Docket No. 9010-RA
Sheet No. 2

railroad in question will undoubtedly continue to assess the intrastate rates until, and unless, stopped by appropriate court order. This is a general revenue case, and is not the proper place to determine the reasonableness of specific rates which may be the subject of substantial controversy. Therefore, it is our finding that we should split-off from this present docket the intrastate rates covered by those series identified as Item 1991 and Item 1999, applicable to the movement of phosphate rock etc., which are contained in Freight Tariff 676-B as published by Southern Freight Tariff Bureau, as well as all supplements thereto and revisions thereof. The proposed increases in these specific intrastate rates will become the subject of Docket No. 69238-RR, hereby established for further processing at such time as the nature of the transportation has been judicially determined.

In our previous consideration of the proposed increases, we were critical of the petitioning railroads because of their failure to provide the Commission with reliable separation data with particular respect to the interstate and the intrastate operating expenses. In the further hearings which we have recently completed and which resulted from the Supreme Court's reversal of our previous order, the railroads have presented for the Commission's consideration separation data which enables us to consider separately the operating results which are directly related to the intrastate rates in question.

In our last consideration of the increases proposed in this docket, the so-called North Carolina formula was applied to certain expense figures which the railroads contended represented Florida intrastate operating expenses. Our criticism in past cases was not directed primarily at the North Carolina formula, but rather to certain preliminary steps which developed the expense figures to which the formula was applied. Specifically, our objection has been to the assignment of expenses to Florida operations based on the use of a system operating ratio. This process was based on the assumption that if, for example, 30 percent of the freight revenue was derived in Florida, then 30 percent of the freight operating expense should be assigned to Florida. This is the step in the separation process to which we object, and we have concluded that the application of the North Carolina Formula on such a premise is of no value and gives us no reliable basis for a determination with respect to results obtained through the application of existing intrastate rates.

In the most recent hearing in this docket additional exhibits were presented, and the North Carolina formula was applied to the system operation. This formula is composed of two primary factors, i.e., tons originated and terminated and ton-miles. The application of the formula can be understood best by considering the following accounts:

1. Maintenance of Way and Structures. This functional group of accounts is for the maintenance expense of all railroad property except the rolling stock. The accounts for roadway, bridges, ties, rails, other track materials, ballast, track laying and surfacing, and fences and signs maintenance, all have

sub-accounts for yard switching, way switching, and running tracks. The yard and way switching track expenses are allocated to Florida intrastate expenses based on the relationship that intrastate freight tons originated and terminated bears to the total tons of freight originated and terminated for the system. The running track expenses are allocated based on the relationship that ton-miles of intrastate traffic bears to the system ton-miles. In our opinion, these are reasonable applications and acceptable for this separation purpose. Freight originates and terminates at either yard or way switching tracks and the tons of traffic handled is related directly to the utilization of the track. The running tracks over which the freight moves also has a direct relationship with ton-miles. The majority of the remaining maintenance expenses in this group are allocated on a composite of accounts previously separated by the two factors.

2. Maintenance of Equipment. This group is composed of the maintenance expense of the locomotives, freight cars, passenger cars and their related expenses. Here, the locomotive repairs expense is sub-divided into yard and other. The yard engine expense is allocated on the basis of tons originated and terminated. The use of the ton factor is proper. The remaining locomotives or "other" and the maintenance to the freight cars is allocated on their usage--ton-miles. This also is proper. The remainder of the expenses is allocated on a composite of the accounts in the group previously allocated.

3. Transportation - Rail Line. These expenses are of two classes. Either the expense is incurred in the yard or on the road. Those expenses occurring in the yard are allocated on the basis of tons originated or terminated. The road expenses are allocated on the basis of ton-miles.

4. Traffic and General. These expenses are allocated on a composite of all of the other expenses.

We have not questioned the separation of freight revenue between intrastate and interstate. The revenue figures are actual, and the books of the railroads are so maintained as to produce such figures, thus avoiding a complicated separations problem.

On the basis of the present record, we find that the apportionment of freight operating expenses between intrastate and interstate operations as used in petitioners' latest exhibits is proper and acceptable.

In the present case, the petitioners have stressed the importance of a reasonable rate of return on the investment in railway property used in rail transportation service, including in such investment cash working capital and materials and supplies. We are not in a position to adopt that approach to railroad rate making. We entertain considerable doubts as to the usefulness of such a tool in measuring the revenue requirements of railroads. We believe that the more logical approach in determining the revenue requirements of petitioners in this docket is to determine their current cost of doing business and

then make a reasonable allowance for earnings on common equity. In this case, we have relied primarily on the operating data of Seaboard Coast Line because it is the predominant rail line in the State. By referring to Exhibit 11, Statement B, Column 5, Lines 5 and 6, we are able to determine that this railroad has an operating ratio, for the period covered by the Exhibit, of 82.[redacted]rcent. Such an operating ratio results in earnings of 1.4% on common equity, which obviously is unreasonably low under prevailing economic conditions. In this case, the record discloses that Seaboard Coast Line would receive approximately $900,000 annually in additional revenue if the proposed increases are approved. This would result in an operating ratio of 80.01 percent and earnings of 3.1 percent on common equity. In our opinion, such earnings on common equity are unreasonably low. For that reason, it is unnecessary to determine what above 3.1 percent would be reasonable for such a rail carrier to be allowed to earn on its common equity. Purely for illustration and with no findings as to its reasonableness, an allowance of 10 percent on common equity would result in an operating ratio for Seaboard Coast Line of 71.19 percent.

Based upon the entire record herein, which was developed before this Commission including the evidence presented at the last hearing in this docket, we find that the proposed increases are fair and reasonable, will not result in excessive earnings for petitioning railroads, and should be approved. We have previously approved these same increases, however, our approval was based on what the Commission and the Supreme Court considered to be insufficient evidence. Further hearings in this docket, and the additional evidence presented by petitioners, confirm our previous decision concerning the reasonableness of the proposed increases and support our re-approval of said increases.

In our previous Order No. 4324 in this Docket, we authorized certain increases requested by Florida Petroleum Haulers Conference and its members with respect to the intrastate movement of petroleum and petroleum products in bulk in tank trucks. We reaffirmed our findings concerning these proposed increases and approve the same for continued application by said tank truck operators.

NOW, THEREFORE, IN CONSIDERATION THEREOF, it is

ORDERED by the Florida Public Service Commission that the increases previously approved in this docket, with the exception of those rates applying on phosphate rock which have been severed from this docket and included in Docket No. 69238-RR for further processing, be and said increases are hereby reaffirmed and approved for continued application by the petitioning railroads, and by tank truck operators with respect to the movement of petroleum and petroleum products in bulk in tank trucks.

By ORDER of CHAIRMAN WILLIAM T. MAYO, COMMISSIONER JERRY W. CARTER, and COMMISSIONER JESS YARBOROUGH, as and constituting the Florida Public Service Commission this 14th day of May 1969.

(S E A L)

ADMINISTRATIVE SECRETARY

SERVICE L E
AUGUST 11, 1969

INTERSTATE COMMERCE COMMISSION
Washington, D. C. 20423

August 4, 1969

NOTICE

No. 35140

APPLICABLE RATES ON PHOSPHATE ROCK - SEABOARD COAST LINE RAILROAD COMPANY

Notice is hereby given that Seaboard Coast Line Railroa Company, by its attorney, Charles B. Evans, 500 Water Street, Jacksonville, Fla. 32202, has filed a petition with the Inter state Commerce Commission praying that the Commission enter a declaratory order determining whether interstate or intra-state rates apply on the transportation of phosphate rock from Clear Springs, Imroc, Noralyn, Pierce, Prairie, and West Polk, Fla., to Sutton, Fla. From Sutton, the commodity moves in interstate or foreign commerce in barges and ships. The petitioner alleges that it is the shipper's intention at the time of tender to it that the commodity be transported in a continuous movement from the points of loading to points beyond the State of Florida. The rates for both interstate and intrastate transportation are published in Southern Freight Tariff Bureau tariff 876-B, Florida Phosphate Rock Tariff, I.C.C. No. S-658. The petitioner further alleges tha the issue has been settled in Finance Docket No. 23688, Atlantic Coast Line Railroad Co. and Seaboard Air Line Rail-road Co. Construction Between Port Meade and Piney Point, Fla at sheets 37-39 of the examiner's report (served September 9, 1966) which was adopted by the Commission on July 28, 1967.

Any persons interested in any of the matters in the petition may, on or before 30 days from the publication of this notice in the Federal Register, file replies to the peti tion supporting or opposing the determination sought. An original and 15 copies of such replies must be filed with the Commission and must show service of 2 copies upon the above-named attorney for the petitioner.

Notice of the filing of this petition will be given by publication in the Federal Register.

H. NEIL GARSON
Secretary

187

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR POLK COUNTY, FLORIDA. CIVIL ACTION.

INTERNATIONAL MINERALS &
CHEMICAL CORPORATION, a)
New York corporation,

Plaintiff,)

vs.)

SEABOARD COAST LINE RAILROAD
COMPANY, a Virginia corporation,)

Defendant.

_ _ _ _ _ _ _ _ _ _)

FILED AUGUST 5, 1969

CASE NO. 69-2560

(Assigned to Judge Willson)

COMPLAINT

Plaintiff, INTERNATIONAL MINERALS & CHEMICAL CORPORATION, by its undersigned attorneys, sues defendant, SEABOARD COAST LINE RAILROAD COMPANY, and alleges:

COUNT I

1. Plaintiff is a New York corporation which has complied with the requirements of Chapter 613, Florida Statutes, 1967, and is permitted to do business in the State of Florida.

2. Defendant is a Virginia corporation with its principal place of business in the State of Florida. Defendant is a "railroad company" as that term is defined in Section 350.10, Florida Statutes, 1967, and a "common carrier" as that term is defined in Section 350.11, Florida Statutes, 1967. Defendant is engaged in the carriage of goods and commodities in intrastate commerce within the State of Florida.

3. Defendant has agents or representatives in Polk County, Florida, and is doing business in Polk County, Florida. This cause of action accrued in Polk County, Florida, as is more particularly shown by the further allegations of this complaint.

4. Count I is based upon the provisions of Chapters 350 and 353, Florida Statutes, 1967.

5. Plaintiff is engaged in Polk County, Florida, in the mining and processing of phosphate rock. Plaintiff's wholly owned subsidiary, IMC Phosphate Terminal Company, is engaged at Sutton, Hillsborough County, Florida, in the receiving, storing, and final processing of phosphate rock from plaintiff's Polk County mines.

6. (a) During the period beginning August 19, 1967 and continuing through June 24, 1968, plaintiff shipped 2,831,352.62 net tons of phosphate rock in intrastate commerce over defendant's railroad from origin points at Prairie, Noralyn, West Polk, and Achan, all in Polk County, Florida, to the consignment of IMC Phosphate Terminal Company at Sutton, Florida. For these shipments, defendant charged, exacted and received from plaintiff a freight rate of 85¢ per net ton, whereas the applicable tariff during said period of time fixed a rate of 75¢ per net ton as per items no. 1930, 1980, 1985, 1990, 1995 of SFTB Freight Tariff No. 876-B, established by the Florida Public Service Commission, applicable on intrastate commerce shipments within the State of Florida. The total amount of overcharges during this period was $283,135.26. A summary sheet showing the origin points, the type product, the number of net tons shipped in intrastate commerce, the freight paid for such shipments, the amount of the overcharges, and other related information covering the period beginning August 19, 1967 and continuing through June 24, 1968 is attached hereto as Exhibit I.

(b) During the period beginning June 25, 1968 and continuing through May 9, 1969, plaintiff shipped 3,913,525.29 net tons of phosphate rock in intrastate commerce over defendant's railroad from origin points at

Prairie, Noralyn, West Polk, and Achan, all in Polk County, Florida, to the consignment of IMC Phosphate Terminal Company at Sutton, Florida. For these shipments, defendant charged, exacted and received from plaintiff a freight rate of 88¢ per net ton, whereas the applicable tariff during said period of time fixed a rate of 75¢ per net ton as per items no. 1930, 1980, 1985, 1990, 1995 of SFTB Freight Tariff No. 876-B, established by the Florida Public Service Commission, applicable on intrastate commerce shipments within the State of Florida. The total amount of overcharges during this period was $508,758.29. Summary sheets showing the origin points, the type product, the number of net tons shipped in intrastate commerce, the freight paid for such shipments, the amount of the overcharges, and other related information covering the period beginning June 25, 1968 and continuing through May 9, 1969 are attached hereto as Exhibits II-A and II-B.

7. On May 26, 1969, plaintiff filed with defendant a written claim totaling $791,893.55 for the overcharges to which reference is made in paragraph 6, above. A copy of plaintiff's letter to defendant which sets forth plaintiff's claim for overcharges is attached hereto as Exhibit III.

8. By letter dated June 11, 1969, defendant denied the claim made by plaintiff on May 26, 1969. A copy of defendant's letter denying plaintiff's claim is attached hereto as Exhibit IV.

9. Defendant, by refusing on June 11, 1969 to pay the claim filed by plaintiff on May 26, 1969, has failed to comply with the provisions of Section 353.01, Florida Statutes, 1967, and is, therefore, liable to plaintiff for interest at the rate of 50% per annum on the principal sum of $791,893.55 from May 26, 1969, the date upon which the claim was filed in accord with the provisions of Section 353.02, Florida

Statutes, 1967, and for plaintiff's attorneys fees in accord with the provisions of Section 353.03, Florida Statutes, 1967.

WHEREFORE, as to Count I, plaintiff demands judgment against defendant for $91,89[illegible] plus interest at the rate of 6% per annum from May 26, 1969, attorneys fees in an amount not to exceed 15% of the amount recovered; and the costs of this action.

COUNT II

10. Plaintiff re-alleges the allegations of paragraphs 1, 2, 3, 5, 7, 8 and 9, above, as if those paragraphs were set forth verbatim in this count.

11. (a) During the period beginning August 19, 1967 and continuing through June 24, 1968, plaintiff shipped [illegible] phosphate rock in intrastate commerce [illegible] and from origin points at Prairie, [illegible] and Achan, all in Polk County, Florida, [illegible] shipments of IMC Phosphate Terminal Company at Sutt[illegible] Florida. For these shipments, defendant charged, exacted and collected from plaintiff an unjust, unreasonable, and unlawful freight rate of $5.6[illegible] per net ton, whereas the just, reasonable and lawful rate for said shipments during said period of time was 79¢ per net ton. The total amount of overcharges during said period was $282,1[illegible]5.26. A summary sheet showing the origin [illegible], the number of net tons shipped in [illegible], the freight paid for such shipments [illegible] the amount of the overcharges, and other related information [illegible] beginning August 19, 1967 and continuing through June 24, 1968 is attached hereto as Exhibit 1.

(b) During the period beginning June 25, 1968 and continuing through May 6, 1969 plaintiff shipped

3,913,525.29 net tons of phosphate rock in intrastate commerce over defendant's railroad from origin points at Prairie, Noralyn, West Polk, and Achan, all in Polk County, Florida, to the consignment of IMC Phosphate Terminal Company at Sutton, Florida. For these shipments, defendant charged, exacted and received from plaintiff an unjust, unreasonable, and unlawful freight rate of 88¢ per net ton, whereas the just, reasonable, and lawful rate for said shipments during said period of time was 75¢ per net ton. The total amount of overcharges during this period was $508,758.29. Summary sheets showing the origin points, the type product, the number of net tons shipped in intrastate commerce, the freight paid for such shipments, the amount of the overcharges, and other related information covering the period beginning June 25, 1968 and continuing through May 9, 1969 are attached hereto as Exhibits II-A and II-B.

12. Defendant owes plaintiff the sum of $791,893.55 for money had and received by defendant from plaintiff as a result of the overcharges described in paragraphs 11(a) and 11(b), above.

WHEREFORE, as to Count II, plaintiff demands judgment against defendant for $791,893.55; the costs of this action; and such other or further relief to which plaintiff may be entitled.

Warren E. Hall, Jr., and

[Exhibits omitted in printing]

Wofford H. Stidham, of
HOLLAND & KNIGHT
P. O. Drawer BW
Lakeland, Florida 33802

Harold E. Spencer, Esquire, of
SWIDLER & BERLNAP
One North LaSalle Street
Chicago, Illinois 60602

Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

INTERNATIONAL MINERALS & CHEMICAL CORPORATION, a New York corporation,	:	
Plaintiff,	:	
vs.	:	No. 69-2560
SEABOARD COAST LINE RAILROAD COMPANY, a Virginia corporation,	:	
Defendant.	:	

MOTIONS

The Defendant files the following Motions to the Complaint herein:

MOTION TO DISMISS

Defendant moves the Court to dismiss the Complaint herein and both counts thereof for failure to state a cause of action or claim upon which relief can be granted against this defendant, in that:

(a) This Court lacks jurisdiction of the subject matter of the Complaint.

(b) That it affirmatively appears that the Court lacks jurisdiction of the subject matter in that the exclusive or primary jurisdiction is in the Interstate Commerce Commission or the Florida Public Service Commission.

(c) That it affirmatively appears from the allegations of the Complaint that the shipments involved are shipments in interstate commerce.

MOTION TO STRIKE

Defendant moves the Court to strike from the Complaint and both counts thereof the claim for interest at the rate of 50% per annum and for attorneys fees upon the ground that the same are not recoverable, that no particular fact on the part of the defendant is alleged or shown,

MOTION FOR MORE DEFINITE STATEMENT

Defendant moves the Court to require the plaintiff to allege with definiteness and particularity the following, upon the grounds that the same are not now alleged with sufficient definiteness and particularity to require or enable the defendant to defend:

(a) How and in what manner the phosphate rock is received, stored and processed at the terminal at Sutton, Florida, and what ultimate disposition is made of the same at Sutton, Florida.

(b) For whose account plaintiff shipped the phosphate rock to Sutton, Florida.

Of Allen, Dell, Frank & Trinkle
P. O. Box 2111, Tampa, Florida
Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was delivered by mail to Mr. Warren E. Hall, Jr. and Wofford H. Stidham of Holland & Knight, P. O. Drawer BW, Lakeland, Florida; Mr. Harold J. Spencer of Swidler & Berlnap, 1 North LaSalle Street, Chicago, Illinois, and to Richard L. Selle, General Attorney, International Minerals & Chemical Corporation, 5401 Old Orchard Road, Skokie, Illinois, Attorneys for Plaintiff, this 15th day of August, 1961.

Ralph C. Dell

SERVICE DATE
NOVEMBER 5, 1969

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 28th day of October, 1969.

No. 35140

APPLICABLE RATES ON PHOSPHATE ROCK - SEABOARD COAST LINE RAILROAD COMPANY

Upon consideration of the petition filed in the above-captioned proceeding by Seaboard Coast Line Railroad Company on July 17, 1969, requesting that the Commission issue a declaratory order concerning the matters described in the Commission's notice of August 4, 1969 (subsequently published in the Federal Register); the motion to dismiss filed by Tampa Phosphate Railroad Company on September 17, 1969; the reply to the motion filed by the petitioner on October 3, 1969; the replies to the petition filed by Tampa Phosphate Railroad Company and by International Minerals & Chemical Corporation on September 17 and 18, 1969, respectively; the motion to strike portions of the reply of International Minerals & Chemical Corporation filed by the petitioner on October 3, 1969; and for good cause:

It is ordered, That the motion to strike be, and it is hereby, granted.

It is further ordered, That the motion to dismiss be, and it is hereby, denied.

And it is further ordered, That, in the exercise of our discretion in this matter, in which the issue is now before the court, the petition be, and it is hereby, denied.

By the Commission, Division 2.

H. NEIL GARSON
Secretary

(SEAL)

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 22nd day of November, 1969, one copy of the foregoing Appendix to Petition for Writ of Certiorari was furnished by delivery to William A. Gillen, Esq., and one copy also by delivery to James E. Thompson, Esq., both of Messrs. Fowler, White, Collins, Gillen, Humkey and Trenam, First Federal Building, Tampa, Florida, attorneys for respondent Seaboard Coast Line Railroad Company, and that one copy of the same was furnished by air mail with postage prepaid to the Solicitor General, Department of Justice, Washington, D. C., and in like manner one copy was furnished to John H. D. Wigger, Esq., Department of Justice, Washington, D. C., and in like manner one copy each to Robert W. Ginnane, Esq., and Jerome Nelson, Esq., Counsel for the Interstate Commerce Commission, Washington, D. C., and that copy has also been furnished by air mail with postage prepaid to the Clerk of the United States Court of Appeals for the Fifth Circuit, 400 Royal Street, New Orleans, Louisiana.

s/ JAMES B. MCDONOUGH, JR.

Counsel for Petitioner

UPREME COURT, U. S.

DEC 10 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 877

TAMPA PHOSPHATE RAILROAD COMPANY,

Petitioner,

vs

SEABOARD COAST LINE RAILROAD COMPANY,

Respondent

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES B. MCDONOUGH, JR.
DAVID C. G. KERR
of Macfarlane, Ferguson, Allison and Kelly

Attorneys for Petitioner
P. O. Box 1531, 512 Florida Avenue
Tampa, Florida

FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

IN THE

Supreme Court of the United States

October Term, 1969

No. 877

TAMPA PHOSPHATE RAILROAD COMPANY,

Petitioner,

vs

SEABOARD COAST LINE RAILROAD COMPANY,

Respondent

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

At the time the Petition for Writ of Certiorari herein was put in the mails on Saturday, November 22, 1969, and at the time of its receipt and docketing in the office of the Clerk of this Court on November 24, 1969, Petitioner and its counsel were totally unaware of the proceeding pending in this Court as No. 477, *Seaboard Coast Line Railroad Co., Petitioner v. Brotherhood of Locomotive Engineers, et al, Respondents,* in which certiorari was granted on November 10, 1969.

The office of Petitioner's counsel uses the Lawyers Edition of the Supreme Court reporter, and the stay granted by Mr. Justice Black in what is now No. 477, is reported in Advance Sheet No. 1 of 24 L.Ed 2d at page 23, which is dated November 10, 1969, but did not reach

counsel's offices until some time during the week commencing November 17, 1969, while the petition in No. 877 was being printed, and it did not come to the attention of counsel until late in the afternoon of November 30, 1969, when counsel was examining the advance sheets of the Supreme Court Reporter edition at the library of the Association of the Bar of the City of New York.

Counsel for petitioner proceeded to Washington on Monday, December 1, 1969, where the status of No. 477 was ascertained at the office of the Clerk of this Court. Counsel did not return to his office in Tampa, Florida, until the afternoon of Friday, December 5, 1969, and this supplement is being printed and forwarded to the Clerk at the first available opportunity.

In No. 477, the petitioner, Seaboard Coast Line Railroad Company (Seaboard), takes the position, among others, that the Federal injunction against the state court proceedings secured by the *Brotherhood* (Petition, p. 16) "amounts to a flat violation of the anti-injunction statute, Section 2283 of the Judicial Code." In No. 877, Seaboard took the position before the Court of Appeals for the Fifth Circuit, and will, presumably, take the same position in this Court, that the injunction staying the proceedings in the state courts which Seaboard sought and obtained for its benefit, does not violate §2283 (Brief for Appellee before the Court of Appeals, p. 5).

The facts in the two proceedings are different in that no labor dispute is involved in No. 877, but each involves the same issue as to the applicability of §2283 to a Federal court injunction staying proceedings of the Florida courts:- in No. 477 after the state court has adjudicated, and where no effort was made to follow the orderly procedure that was followed in *Brotherhood of Railroad Trainmen, et al. v. Jacksonville Terminal Co.*, 394 U.S. 369, 89 S.Ct. 1109, 22 L.Ed 2d 344 (March 25, 1969), and in No. 877 *before* the state courts have adjudicated, the Court of Appeals forbidding the state courts to act and thus precluding any orderly procedure, except by the petition to this Court for writ of certiorari, pending in No. 877.

CONCLUSION

The existence of the question as to the applicability of §2283 in the two cases should be called to the attention of the Court, and the Respondent should be given opportunity to respond to this Supplement.

If this matter should have been called to the attention of the Court by Motion under Rule 35 of the Rules of the Supreme Court, Petitioner respectfully prays that this Supplement may be treated as a motion to amend the Petition to include the above statements.

Petitioner further respectfully prays that if certiorari is granted in No. 877 the two cases may be argued together.

Respectfully submitted,

Dated at Tampa, Florida
December 8, 1969

s/ James B. McDonough, Jr.

JAMES B. MCDONOUGH, JR.
DAVID C. G. KERR
of Macfarlane, Ferguson, Allison and Kelly

Attorneys for Petitioner
P. O. Box 1531, 512 Florida Avenue
Tampa, Florida

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 8th day of December, 1969, one copy of the foregoing Supplement to Petition for Writ of Certiorari was furnished by delivery to William A. Gillen, Esq., and one copy also by delivery to James E. Thompson, Esq., both of Messrs. Fowler, White, Collins Gillen, Humkey and Trenam, First Federal Building, Tampa, Florida, attorneys for respondent Seaboard Coast Line Railroad Company and that one copy of the same was furnished by airmail with postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., and in like manner one copy was furnished to John H. D. Wigger, Esq., Department of Justice, Washington, D.C. and in like manner one copy each to Robert W. Ginnane, Esq., and Jerome Nelson, Esq., Counsel for the Interstate Commerce Commission, Washington, D.C., and that copy has also been furnished by air mail with postage prepaid to the Clerk of the United States Court of Appeals for the Fifth Circuit, 400 Royal Street, New Orleans, Louisiana.

s/ James B. McDonough, Jr.

IN THE

Supreme Court of the United States

DEC 22 1969
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1969

~~877~~

No. _____

TAMPA PHOSPHATE RAILROAD COMPANY,
Petitioner,

-vs-

SEABOARD COAST LINE RAILROAD COMPANY
Respondent.

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM A. GILLEN
JAMES E. THOMPSON
Of
FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM
P. O. Box 1438, Tampa, Florida
Attorneys for Respondent

FREE PRESS PUB. CO., INC. - TAMPA

INDEX

	Page
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED BY PETITIONER	2
POINTS URGED BY PETITIONER	3
STATEMENT OF THE CASE	4-7
ARGUMENT	
POINT I	8-10
POINT II	11-12
POINT III	13-14
POINT IV	14
POINT V	14-16
POINT VI	16
CONCLUSION	17
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

Case	Page
Chaflin v. Houseman, 93 U.S. 130, 23 L.Ed. 833 (1876)	11
Dilworth v. Riner, 343 F.2d 226 (CA 5, 1966)	10
Dowd Box Co. v. Courtney, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed. 2d 483 (1962)	11
Ellis v. Dixon, 349 U.S. 458, 75 S.Ct. 850 (1955)	15
F & C v. Travelers Health Assn., 362 U.S. 293, 80 S.Ct. 717 (1960)	15
Holmes v. Trout, 32 U.S. 171, 7 Pet. 171, 8 L.Ed. 647 (1833)	1
Kerr v. Clampitt, 95 U.S. 188, 24 L.Ed. 493 (1877)	1
Meyers v. Famous Realty, Inc., 271 F.2d 811 (2d Cir. 1959), cert. den. 362 U.S. 910, 80 S.Ct. 681, 4 L.Ed. 619 (1960)	11
Nelson v. County of Los Angeles, 362 U.S. 1, 80 S.Ct. 527 (U.S. 1960)	15
Nelson v. United States, 355 U.S. 544 (1958)	8
Piedmont & Northern v. United States, 280 U.S. 469, 74 L.Ed. 551 (1930)	16
Riss & Co. v. United States, 117 F.Supp. 296 (W.D. Mo. 1952)	9
Rochester Telephone Corp. v. United States, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147 (1939)	16

TABLE OF AUTHORITIES (Continued)

Case	Page
St. Louis S. W. Ry. Co. v. Missouri Pac. R. Co., 289 U.S. 76, 53 S.Ct. 516 (1933)	9, 10, 12
Seatrain v. Penn R. Co., 207 F.2d 255 (CA 3, 1953), cert. den. 345 U.S. 916, 73 S.Ct. 727 (1953)	8
Texas and Pacific v. Gulf, 270 U.S. 266, 70 L.Ed. 578 (1926)	15
Thomson v. Gaskill, 315 U.S. 442, 62 S.Ct. 673, 86 L.Ed. 951 (1942)	1
U. S. v. Fleischman, 339 U.S. 349, 70 S.Ct. 739 (1950)	15
United States v. Idaho, 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070 (1936)	16
United States v. Maher, 307 U.S. 148, 59 S.Ct. 768 (1939)	16
United States v. Southern Ry. Co., 364 F.2d 86 (CA 5, 1966), cert. den. 386 U.S. 1031, 87 S.Ct. 1479 (1967)	8
United States v. Southern Ry. Co., 380 F.2d 49 (CA 4, 1967)	8
Village of Mantorville v. Chicago G. W. R. Co., 8 Fed. Supp. 791 (D. Minn. 1934)	8-9

IN THE

Supreme Court of the United States

October Term, 1969

NO. _____

TAMPA PHOSPHATE RAILROAD COMPANY,
Petitioner,

-vs-

SEABOARD COAST LINE RAILROAD COMPANY
Respondent.

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PRELIMINARY STATEMENT

Pages 29-31 of the brief, pages 171-194 of the Appendix and the Supplement to Petition are completely outside the record in this case, are immaterial, are unauthenticated and on their face show dates not only subsequent to the Order of the District Judge but also subsequent to the oral argument and partly after the Rehearing was denied by the Fifth Circuit. They should be stricken or ignored, as they add nothing to the case even if they were properly before the Court. *Holmes v. Trout,* 32 U.S. 171, 7 Pet. 171, 8 L.Ed. 647 (1833); *Kerr v. Clampitt,* 95 U.S. 188, 24 L.Ed. 493 (1877); *Thomson v. Gaskill,* 315 U.S. 442, 62 S.Ct. 673, 86 L.Ed. 951 (1942).

QUESTIONS PRESENTED BY PETITIONER

1. WAS THE INJUNCTION ISSUED BY THE ONE JUDGE FEDERAL DISTRICT COURT STAYING THE EMINENT DOMAIN PROCEEDINGS IN THE STATE COURTS EXPRESSLY AUTHORIZED BY ACT OF CONGRESS?

2. IS THE CONSTRUCTION OF §1(20) TO BE THE EXPRESS AUTHORITY OF AN ACT OF CONGRESS TO STAY THE EMINENT DOMAIN PROCEEDINGS IN THE STATE COURTS, EITHER (a) A DECISION OF THE COURT OF APPEALS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT OR (b) SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE BY THIS COURT OF ITS POWER OF SUPERVISION?

3. DOES THE CONSTRUCTION OF §1(20) and §§2321-2324 AS DEPRIVING TAMPA OF THE RIGHT TO HAVE ANY JUDICIAL TRIAL ON THE QUESTION OF THE JURISDICTION OF THE COMMISSION DENY TAMPA DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

4. DOES THE CONSTRUCTION OF §1(20) and §§2321-2325 AS OUSTING THE STATE COURTS OF THE POWER TO DETERMINE THEIR OWN JURISDICTION IN EMINENT DOMAIN PROCEEDINGS INVADE THE RESERVED POWERS OF THE STATES IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

POINTS URGED BY PETITIONER

POINT I

THE OPINION OF THE COURT OF APPEALS CHANGED THE CHARACTER OF THE INJUNCTION AND TERMINATED THE LITIGATION.

POINT II

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

POINT III

THE DECISION OF THE COURT OF APPEALS DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE BY THIS COURT OF ITS POWER OF SUPERVISION.

POINT IV

§1(20) and §§2321-2325 AS NOW CONSTRUED, BY DENYING TO TAMPA ANY JUDICIAL DETERMINATION OF THE JURISDICTION OF THE COMMISSION DENY TAMPA DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

POINT V

THE CONSTRUCTION OF §1(20) and §§2321-2325 AS OUSTING THE STATE COURTS OF THEIR OWN JURISDICTION IN EMINENT DOMAIN PROCEEDINGS INVADES THE RESERVED POWERS OF THE STATES IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

POINT VI

THE OPINION OF THE COURT OF APPEALS PRESENTS SERIOUS QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

STATEMENT OF THE CASE

The history of the Proceedings and of the case was accurately and adequately stated by Circuit Judge Goldberg in the opinion of the Fifth Circuit:

"This case involves the right of a company to condemn lands in furtherance of its railroading ambitions after it has been denied a certificate of public convenience and necessity by the Interstate Commerce Commission. We must decide whether a federal district court has the power under 49 U.S.C.A. §1(20) to issue an injunction against condemnation proceedings in state courts that are said to violate §1(18) of the Interstate Commerce Act. We also find it necessary to consider what defenses, if any, may be asserted in opposition to the alleged violation.

The history of this case begins in July of 1965 when Tampa Phosphate Railroad Company (Tampa), a corporation not yet operating as a railroad, filed an application with the Interstate Commerce Commission (Commission) questing for authority to construct a railroad under Section 1(18)-1(22) of the Interstate Commerce Act. See 49 U.S.C.A. §1(18-1(22). In its application Tampa declared that the proposed railroad was intended primarily to transport phosphate rock and all products thereof from Port Sutton in Hillsborough County, Florida, to a point some thirty miles away in Polk County, Florida. Tampa prayed for the grant of a certificate authorizing construction of this railroad, and in the alternative for dismissal of its application as beyond the Commission's jurisdiction. Tampa contended in support of this alternative that (a) its proposed railroad would operate

only in *intrastate* commerce, and (b) that the line would constitute a spur or industrial track within the exemption of 49 U.S.C.A. §1(22).

After hearings, the Interstate Commerce Commission examiner recommended denial of the application. He held that the Commission did have jurisdiction because the proposed railroad would operate in *interstate* commerce, and he found that the new trackage would not constitute a spur or industrial track within the meaning of §1(22). He then denied Tampa's application, ruling that construction and operation had not been shown to be required by the present and future public convenience and necessity.

Subsequent to the completion of the administrative hearing, the Interstate Commerce Commission found in a decision dated August 7, 1967, that "the findings and conclusions of the hearing examiner on matters of fact and law considered and disposed of in his report and recommended order are in all material respects proper and correct." The order of the examiner denying Tampa's application was thereupon affirmed and adopted by the Commission. No appeal was taken from this order.

Following the denial of its application, Tampa directed its full energies toward a series of condemnation suits then in progress in the state courts of Florida. The first and second of these suits had begun on October 13, 1965, in the Circuit Court of Hillsborough County, Florida, while Tampa's application was still pending before the Commission. The third suit began a short time later in the Circuit Court of Polk County, Florida. In all proceedings Tampa sought easements or rights-of-way for its proposed railroad across existing trackage of the Seaboard Coast Line Railroad Company (Seaboard). As authority for these easements, Tampa relied upon certain Florida eminent domain statutes

permitting one railroad to cross the tracks of another railroad. See F.S.A. §§73.012, 73.021, 73.151, 360.101, 361.01. Seaboard opposed Tampa's petition in each state court and sought dismissal of the actions on the grounds, *inter alia,* that the proposed construction would be in interstate commerce and that the Commission had denied Tampa the requisite certificate. The Circuit Court of Polk County, apparently reserving its ruling on Seaboard's motion to dismiss, scheduled the matter for trial on December 18, 1967.

Meanwhile, Seaboard had initiated this suit in the United States District Court for the Middle District of Florida. Seaboard there sought an injunction to prevent Tampa from continuing condemnation proceedings against Seaboard's property, and further sought to enjoin Tampa from constructing or operating any railroad facilities without first procuring a certificate from the Commission. Tampa's actions were alleged to be in violation of §1(18) of the Interstate Commerce Act, 49 U.S.C.A. §1(18), and an injunction was sought under §1(20) of the Act, 49 U.S.C.A. §1(20), to prevent further violations.

Tampa responded to Seaboard's complaint with an answer and with a motion to dismiss. Argument on the motion to dismiss was held on December 12, 1967, and on December 14, 1967, the district court denied Tampa's motion to dismiss and granted a preliminary injunction against any condemnation of Seaboard's property or construction thereon until a certificate of convenience and necessity was procured from the Commission. In its findings of fact and conclusions of law, the court found that it had jurisdiction under 28 U.S.C.A. §89(b), 28 U.S.C.A. §1337, and 49 U.S.C.A. §1(18-1(20). It also found that Seaboard was a proper party in interest within the meaning of 49 U.S.C.A. §1(20). The

court overruled Seaboard's motion for judgment on the pleadings, holding that the order of the Interstate Commerce Commission was not res judicata on the intrastate or interstate character of the proposed railroad. It then reserved this issue of interstate commerce for independent investigation at a later date. The court also determined that the provisions of 28 U.S.C.A. §2283 "are not applicable or controlling in this case."

Further argument was heard on the case on March 6, 1968, and on April 22, 1968, the court overruled Tampa's motion to dissolve and vacate the preliminary injunction. Again the court reserved ruling on the interstate or intrastate character of the proposed railroad. Tampa appeals to this court from the denial of its motion to vacate. 28 U.S.C.A. §1292(a) (1).

ARGUMENT

PETITIONER'S POINT I

THE OPINION OF THE COURT OF APPEALS CHANGED THE CHARACTER OF THE INJUNCTION AND TERMINATED THE LITIGATION.

The concurring opinion would hold that the injunction against construction of the Tampa Phosphate Railroad without first obtaining a Certificate of Convenience and Necessity should be made permanent. This is the correct position. Tampa originally invoked the jurisdiction of the ICC by asking for such certificate. The ICC found that the proposed operation would be in interstate commerce and Tampa's defense to the 1(20) action was on the theory that its operation will be solely intrastate. Acceptance of this defense would annul the decision of the ICC in effect, so it would clearly involve a collateral attack on that order. The ICC order cannot be attacked collaterally and should be reviewed by a three-judge court.

ICC orders can only be reviewed by a three judge court under the Urgent Deficiencies Act. See *United States v. Southern Ry. Co.*, 364 F.2d 86 (CA 5, 1966) cert. den. 386 U.S. 1031 and *United States v. Southern Ry. Co.*, 380 F.2d 49 (CA 4, 1967).

The rule precluding collatteral attack of ICC orders has also been recognized in *Nelson v. United States*, 355 U.S. 544 (1958); in *Seatrain v. Penn. R. Co.*, 207 F.2d 255 (CA 3, 1953), cert. den. 345 U.S. 916, 73 S.Ct. 727 (1953) (where an unappealed ICC ruling as to its jurisdiction was held res judicata in subsequent injunction suit); *Village of Mantorville v. Chicago G. W. R.*

Co., 8 Fed. Supp. 791 (D. Minn. 1934) *Riss & Co. v. United States*, 117 F.Supp. 296 (W.D. Mo. 1952) and many others.

But the Court of Appeals did not so rule. The cause was remanded for further proceedings with tacit permission for Petitioner to litigate the question of whether its operation would be subject to regulation by the ICC, provided the operation has been modified to the extent necessary to avoid the application of collateral estoppel. At this juncture the matter is still interlocutory in nature and the order should not be disturbed.

Nor does §2283 constitute a legitimate objection to the maintenance of the injunction suit.

SCL asked for and got a temporary injunction pursuant to 49 U.S.C.A. §1(20) against construction of a new line of railroad without first obtaining the Certificate required by 49 U.S.C.A. §1(18), and against the prosecution of the State Court condemnation suits as a part of the construction. Petitioner's statement that "the only relief prayed for was the restraint of the state courts" is untrue but immaterial.

Section 2283 does not bar injunctions expressly authorized by Act of Congress or where necessary in aid of the Court's jurisdiction or to protect or effectuate its judgments.

Section 1(18) bars construction without a certificate. The eminent domain suits were as much a part of the construction as driving spikes. Section 1(20) expressly authorizes injunctions against such construction in violation of §1(18); See *St. Louis S. W. Ry.*

Co. v. Missouri Pac. R. Co., 289 U.S. 76, 53 S.Ct. 516 (1933). See also *Dilworth v. Riner*, 343 F.2d 226 (CA 5, 1966), and the many cases cited by the Court below.

And the injunction against the State Court proceedings if not expressly authorized by §1(20) was necessary in aid of the courts jurisdiction to enjoin the construction in violation of §1(18), as Tampa should not be permitted to condemn railroad land under a state statute for the purpose of constructing a railroad which the Federal law bars the construction of.

Nor has the argument about concurrent jurisdiction any merit. There was no state court §1(20) suit and there was no Federal Court condemnation.

The §1(20) injunction sought and obtained by SCL was not barred by §2283.

PETITIONER'S POINT II

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

The decision of the Court of Appeals is not in conflict with the previous decisions cited by Petitioner or with any other decisions.

Dowd Box Co. v. Courtney, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962) only held that a statute providing that certain rights could be enforced in Federal Court did not prevent enforcement of the same rights in State Court. *Chaflin v. Houseman,* 93 U.S. 130, 23 L.Ed. 833 (1876) held that a statute authorizing a Trustee in Bankruptcy to sue in Federal Courts did not prevent his bringing an action in a State Court.

These cases might be in point if a §1(20) injunction against construction in violation of §1(18) had been sought in state court and had been dismissed because of exclusive jurisdiction of Federal Court to grant such injunction[1] but such was not the case. No §1(20) suit was ever brought in state court. The only actions brought in state court were petitioner's eminent domain proceedings. The only court where §1(20) proceeding was instituted was the United States District Court.

---

[1] Although it may well be that Federal Courts do have exclusive jurisdiction to grant such remedy — See *Meyers v. Famous Realty, Inc.,* 271 F.2d 811 (2d Cir. 1959) cert. den. 362 U.S. 910, 80 S.Ct. 681, 4 L.Ed2d 619, wherein the Second Circuit said "it is clear that the United States District Court is the only forum having jurisdiction to prevent an illegal abandonment begun without the institution by the Carrier of a Section 1(20) proceeding before the Commission.

Nor is there any conflict with the other cases cited in Point II. The question of whether a §1(20) action *can* be maintained in a state court was not reached by this Court. The statute provides that unauthorized construction "*** may be enjoined by any Court of competent jurisdiction at the suit of *** any party in interest; ***" No such suit is or was pending in the state courts. Tampa merely sought to condemn lands. SCL did not institute the condemnation proceedings and did not ask the State Courts to enjoin construction. SCL did what this Court told it was the proper procedure in *St. Louis South Western Ry. Co. v. Missouri Pacific R. Co., supra.* In that case the Mo. Pac. sued in State Court seeking the right to cross the St. Louis in connection with proposed construction. St. Louis interposed the defense that the line could not be built under §1(18) without ICC authorization. This Court held that the proper remedy for St. Louis was "*** not by way of defense to an application to fix the place and manner of crossing" but by "a proceeding to enjoin" under §1(20) (289 U.S. at 81-83), which could be done in Federal Court. Following the advice of this Court, SCL did precisely that and filed a §1(20) injunction action in Federal Court.

Instead of conflicting with previous decisions, the procedure followed and the Court's ruling precisely followed the authorities.

The Petition should be denied.

PETITIONER'S POINT III

THE DECISION OF THE COURT OF APPEALS DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE BY THIS COURT OF ITS POWER OF SUPERVISION.

Point III appears to raise substantially the same questions as Point II and is bottomed on the same erroneous interpretation of the proceedings below.

The state courts were not ousted of any jurisdiction. No §1(20) action was attempted in the State Courts. The only §1(20) action filed was in the Federal Court for the purpose of enjoining construction of a railroad in violation of §1(18), as was expressly authorized by that Act of Congress. A vital first step to the construction of the railroad was obtaining the right of way, so the eminent domain proceedings were enjoined also.

Had Tampa not invoked the jurisdiction of the ICC by filing an application for a Certificate of Convenience and Necessity, the collateral estoppel doctrine would not be invoked and the District Court would have free rein on the question of whether the proposed construction would be in interstate commerce or not. But Tampa did apply to the ICC which found that it had jurisdiction (that the proposed railroad would be in interstate commerce) but denied the certificate. Being unsatisfied by this ruling, Tampa, rather than accept or appeal it, chose to ignore it, apparently feeling that it would go away. This it cannot do and the Court quite

correctly held that so long as the ICC order remains outstanding the only way to attack matters litigated there is by direct attack under the Urgent Deficiencies Act and that the doctrine of collateral estoppel prevents its relitigating the question in Court unless it first shows that it has so modified its proposed railroad as to take itself out from under the doctrine of collateral estoppel. The court should have held, as suggested in the concurring opinion, that the doctrine applies and that Tampa cannot build its railroad without first:

(a) getting a certificate of convenience and necessity from the ICC, or

(b) appealing the ICC jurisdictional findings to a three judge court under the orderly procedure provided by Congress therefor.

The only case cited by petitioner under this point is a Jones Act case which has nothing to do with any issue before the lower Courts or this court.

PETITIONER'S POINTS IV AND V

§1(20) AND §§2321-2325 AS NOW CONSTRUED, BY DENYING TO TAMPA ANY JUDICIAL DETERMINATION OF THE JURISDICTION OF THE COMMISSION DENY TAMPA DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

THE CONSTRUCTION OF §1(20) AND §§2321-2325 AS OUSTING THE STATE COURTS OF THEIR OWN JURISDICTION IN EMINENT DOMAIN PROCEEDINGS INVADES THE RESERVED POWERS OF THE STATES IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

These constitutional points were not raised in the District Court and were not mentioned in the Court of Appeals until October 13, 1969 in Tampa's Petition for Rehearing after rendition of the Opinion of the Fifth Circuit.

Questions not raised in the proceeding below are not open in a proceeding on petition for certiorari. *Ellis v. Dixon,* 349 U.S. 458, 75 S.Ct. 850 (1955); *Nelson v. County of Los Angeles,* 362 U.S. 1, 80 S.Ct. 527 (U.S. 1960); *F & C v. Travelers Health Assn.,* 362 U.S. 293, 80 S.Ct. 717 (1960); *U.S. v. Fleischman,* 339 U.S. 349, 70 S.Ct. 739 (1950).

Further, petitioners argument on these points is patently fallacious. *Texas and Pacific v. Gulf,* 270 U.S. 266, 70 L.Ed. 578 (1926) did *not* hold that an ICC order could be collaterally attacked or attacked at all other than by direct attack to a three judge court. There was no ICC order involved in that case. It merely held in that context that one railroad could bring a §1(20) suit in Federal Court to enjoin construction in violation of §1(18) in which event the Court would determine whether the construction would violate §1(18). This is just what the District Court here proposed to do and

what the Court of Appeals told it to do even though the ICC had already ruled that the operation would be in interstate commerce.

And Petitioner, apparently still relying on *Piedmont & Northern v. United States,* 280 U.S. 469, 74 L.Ed. 551 (1930) in spite of the fact that it was specifically overruled by *Rochester Telephone Corp. v. United States,* 307 U.S. 125, 59 S.Ct. 754, 83 L.E. 1147 (1939) and by *United States v. Maher,* 307 U.S. 148, 59 S.Ct. 768 (1939), claims the right to a trial de novo, citing as further authority for such right *United States v. Idaho,* 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070 (1936), a case brought before a three judge court under the Urgent Deficiencies Act and appealed to this Court.

Tampa's right to its day in Court has not been impaired nor has the lower court impinged on the jurisdiction of the State Courts.

On the contrary, to adopt petitioners position would be to usurp for the State Courts the jurisdiction of the three judge federal court.

PETITIONER'S POINT VI

THE OPINION OF THE COURT OF APPEALS PRESENTS SERIOUS QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The text under Point VI does not support the Point as stated and the cited case supports neither.

This point is not well taken.

CONCLUSION

The decision of the Court of Appeals was correct, was supported by the previous decisions, does not conflict with previous decisions of other circuits, there are no constitutional rights affected and no reason has been shown why this Court should elect to take jurisdiction. The petition for writ of certiorari should be denied.

Respectfully submitted,

FOWLER, WHITE, COLLINS,
GILLEN, HUMKEY & TRENAM
P. O. Box 1438, Tampa, Florida
Attorneys for Respondent

By_____
WILLIAM A. GILLEN

By_____
JAMES E. THOMPSON

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 20th day of December, 1969, one copy of the foregoing Petition for Writ of Certiorari was furnished by delivery to James B. McDonough, Jr. and one copy also by delivery to David C. G. Kerr both of Messrs. Macfarlane, Ferguson, Allison and Kelly and that one copy of the same was furnished by air mail with postage prepaid to the Solicitor General, Department of Justice, Washington, D. C., and in like manner one copy was furnished to John H. D. Wigger, Esq., Department of Justice, Washington, D. C., and in like manner one copy each to Robert W. Ginnane, Esq., and Jerome Nelson, Esq., Counsel for the Interstate Commerce Commission, Washington, D. C., and that copy has also been furnished by air mail with postage prepaid to the Clerk of the United States Court of Appeals for the Fifth Circuit, 400 Royal Street, New Orleans, Louisiana.

s/JAMES E. THOMPSON

Counsel for Respondent

LIBRARY
REME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 29 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 877

TAMPA PHOSPHATE RAILROAD COMPANY,
Petitioner,

—VS—

SEABOARD COAST LINE RAILROAD COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER

JAMES B. MCDONOUGH, JR.
DAVID C. G. KERR
of MACFARLANE, FERGUSON,
ALLISON & KELLY
Attorneys for Petitioner

512 Florida Avenue,
P.O. Box 1531
Tampa, Florida 33601

TYPE SETTERS PUB. CO., INC. TAMPA, FLORIDA

TABLE OF CONTENTS

	Page
Reply Brief for Petitioner	1
Conclusion	6
Appendix 1	7
Appendix 2	8
Certificate of Service	9

TABLE OF AUTHORITIES

Cases

Page

Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, No. 477 ..... 1, 2, 3, 6

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,
394 U.S. 369, 89 Sup. Ct. 1109, 22 L.Ed 2d 344 (1969) 3

Dick v. New York Life Ins. Co.,
359 U.S. 437, 79 Sup. Ct. 921, 3 L.Ed 2d 935 (1959) 1

Holmes v. Trout,
32 U.S. 171, 8 L.Ed 647 (1833) 1

Kerr v. Clampitt,
95 U.S. 188, 24 L.Ed 493 (1877) 1

St. Louis, S.W.R. Co. v. Missouri P.R. Co.,
289 U.S. 76, 77 L.Ed 1042 (1933) 5

Texas & P.R. Co. v. Gulf C. & S.F.R. Co.,
270 U.S. 266, 70 L.Ed 578 (1926) ..... and Appendix 2

Thompson v. Gaskill,
315 U.S. 442, 63 Sup. Ct. 673, 86 L.Ed 951 (1942) 1

Statutes

28 U.S.C.A. §2283 2

49 U.S.C.A. §1(20) 5

Judiciary Act of February 13, 1925
(43 Stat. 936) 1

Act of June 25, 1948
(62 Stat. 869) 1

IN THE

Supreme Court of the United States

October Term, 1969

No. 877

TAMPA PHOSPHATE RAILROAD COMPANY,

Petitioner,

—vs—

SEABOARD COAST LINE RAILROAD COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER

The matter set forth on pages 29-31 of the Petition and pages 171-194 of the Appendix cannot be ignored, any more than the grant of certiorari by this Court in No. 477, *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, et al,* to which reference is made in Petitioner's Supplement to Petition, can be ignored. In the exercise of its certiorari jurisdiction this Court exercises a discretion in the public interest, and is not restricted to the common law rules of appellate review of controversies between particular litigants,[1] and the material to which Seaboard objects

[1]For which respondent cites *Holmes v. Trout,* 32 U.S. 171, 8 L.Ed 647 (1833), *Kerr v. Clampitt,* 95 U.S. 188, 24 L.Ed 493 (1877) and *Thompson v. Gaskill,* 315 U.S. 442, 63 Sup.Ct. 673, 86 L.Ed 951 (1942). The first two were decided prior to the Judiciary Act of February 13, 1925 (43 Stat. 936) and the third prior to the Act of June 25, 1948 (62 Stat. 869). See Mr. Justice Frankfurter's discussion of this Court's certiorari jurisdiction in the dissenting opinion in *Dick v. New York Life Ins. Co.,* 359 U.S. 437, 79 Sup. Ct. 921, 3 L.Ed 2d 935 (1959).

be presented in either case and that there should be reversals in both cases, thus allowing the state courts to proceed, subject, of course, to this Court's ultimate review.

The flat statement on page 13 of the Seaboard's Brief for Respondent that "The state courts were not ousted of any jurisdiction" is difficult to follow. The Court of Appeals in No. 877 ousted of their jurisdiction both the one judge Federal district court (A. 25) and the state courts, the latter on the ground that their eminent domain proceedings under statutes in effect for one hundred years, were "in complete derogation of federal law" (A. 17).

In response to the charge in Respondent's brief that Petitioner's statement as to the relief sought by Seaboard in its Federal court action (Petition, p. 32) "is untrue but immaterial" (Brief of Respondent, p. 9), the full prayer for relief in Seaboard's Federal court action is printed as Appendix 1 hereto. There has at no time been any physical construction under way or threatened, and the relief sought by Seaboard, as a practical matter, was only and solely to put a stop to the proceedings in the state courts.

Petitioner has never agreed with the statement of the Court of Appeals that (A. p. 12) "There appears to be no serious question that an attempt to condemn lands * * * constitutes construction." It is too patent for argument that if the attempt is unsuccessful the attempt does not constitute construction, but the Court of Appeals was unwilling even to await the outcome of the attempt.

The Respondent seeks to lessen the force of *Texas & P. R. Co. v. Gulf C. & S. F. R. Co.*, 270 U.S. 266, 70 L.Ed 578 (1926) by saying that that case (Brief of

Respondent, p. 15), "* * * did *not* hold that an ICC order could be collaterally attacked or attacked at all other than by direct attack to a three judge court." This Court did hold, in that case, that the applicant lost no right to question the Commission's jurisdiction by applying to it, and the pertinent part of that opinion is printed as Appendix 2 hereto.

Respondent contends (Brief of Respondent, p. 12) that, "SCL did not institute the condemnation proceedings and did not ask the state courts to enjoin construction." Seaboard did ask the state courts to dismiss each of the condemnation actions on the same grounds Seaboard would have alleged if it had brought a §1(20) action in the state courts (R. 364, 496-497, and 513), and the argument that the same issue was not before the state courts because the Seaboard was not a plaintiff in a §1(20) action is but an exercise in semantics.[4]

Respondent contends, on page 15 of its brief, that the constitutional questions were not raised in the District Court, or before the Court of Appeals, until Tampa's petition for rehearing, and should not now be considered. The reason is obvious, as they were raised only by the opinion of the Court of Appeals, which went far beyond anything contemplated by the District Court, and the first opportunity at which these questions could be raised was in the Petition for Rehearing to the Court of Appeals.

---

[4]The case of *St. Louis S. W. R. Co. v. Missouri P. R. Co.*, 289 U.S. 76, 77 L.Ed 1042 (1933) is of limited application because of the Arkansas statute. It began by an application to the Arkansas Commission and not by a suit in the state court.

CONCLUSION

The Petition for Writ of Certiorari in No. 877 should likewise be granted and in such event Nos. 477 and 877 should be argued and disposed of together.

Dated at Tampa, Florida
December 24, 1969

Respectfully submitted,

JAMES B. MCDONOUGH, JR.
DAVID C. G. KERR

of MACFARLANE, FERGUSON, ALLISON & KELLY

Attorneys for Petitioner
512 Florida Avenue,
P.O. Box 1531
Tampa, Florida 33601

APPENDIX 1

(Prayer for relief in Seaboard's complaint in the United States District Court, R. 24 and 25)

"Wherefore, plaintiff sues defendant and prays that the Court:

1. exercise jurisdiction of this action and the parties.

2. enjoin and restrain defendant, its officers, agents, servants, and employees during the pendency of this action and permanently, from continuing and maintaining condemnation proceedings against defendant in the Circuit Court for Polk County, Florida, or elsewhere, for the purpose of acquiring an interest in its property located in Polk County, Florida.

3. enjoin and restrain defendant, its officers, agents, servants, and employees, during the pendency of this action and permanently, from erecting, constructing, installing, maintaining or operating any railroad tracks, or any other facilities whatsoever in connection therewith.

4. Grant such other and further relief as may be just and proper.

FOWLER, WHITE, COLLINS, GILLEN, HUMKEY AND TRENAM
Post Office Box 1438
Tampa, Florida

(Signed) GEORGE C. WINN

Attorneys for Plaintiff"

APPENDIX 2

In *Texas & P. R. Co. v. Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 70 L.Ed 578 (1926), this Court said (70 L.Ed 578, at 582):

> "A carrier desiring to construct new tracks does not, by making application to the Commission, necessarily admit that they constitute an extension. It may secure a determination of the question, without waiving any right, by asserting in the application that in its opinion a certificate is not required because the construction involves only an industrial track. * * *
>
> "The issue presented to the court by a denial that the proposed trackage is an extension does not differ in its nature from that raised when the denial is directed to the allegation that the defendant is an interstate carrier. Compare *Smyth v. Asphalt Belt R. Co.*, 267 U.S. 326, 328, 329, 69 L.Ed 629-631, 45 Sup. Ct. Rep. 242. If the facts are agreed the question is one of law. If the facts are not agreed, the court must find them. In the case at bar, the district court, having jurisdiction generally of the parties and of the subject matter, was called upon to determine whether an allegation in the bill, essential to the cause of action, was established. This the court clearly had power to do. Moreover, even if the question presented were, as contended, properly one of jurisdiction, the objection urged could not prevail. Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist."

The opinion of the Court of Appeals in No. 877 denies to both the state courts and to the one judge Federal District Court the power even to determine whether the conditions essential to the exercise of their jurisdiction exist.

CERTIFICATE OF SERVICE

I DO CERTIFY that on this 24th day of December, 1969, one copy of the foregoing Reply Brief was furnished by mail to William A. Gillen, Esq., and one copy also by mail to James E. Thompson, Esq., both of Messrs. Fowler, White, Collins, Gillen, Humkey and Trenam, First Federal Building, Tampa, Florida, attorneys for respondent Seaboard Coast Line Railroad Company, and that one copy of the same was furnished by air mail with postage prepaid to the Solicitor General, Department of Justice, Washington, D. C., and in like manner one copy was furnished to John H. D. Wigger, Esq., Department of Justice, Washington, D. C., and in like manner one copy each to Robert W. Ginnane, Esq., and Jerome Nelson, Esq., Counsel for the Interstate Commerce Commission, Washington, D. C., and that copy has also been furnished by air mail with postage prepaid to the Clerk of the United States Court of Appeals for the Fifth Circuit, 400 Royal Street, New Orleans, Louisiana.

s/JAMES B. MCDONOUGH, JR.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court
FILED
JAN 15 1970
JOHN F. DAVIS, CLERK

No. 377

In the Supreme Court of the United States

OCTOBER TERM, 1969

TAMPA PHOSPHATE RAILROAD COMPANY, PETITIONER

v.

SEABOARD COAST LINE RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
RICHARD W. McLAREN,
Assistant Attorney General,
HOWARD E. SHAPIRO,
W. RICHARD HADDAD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ROBERT W. GINNANE,
General Counsel,
JEROME NELSON,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

INDEX

	Page
Statement	2
Discussion	6
Conclusions	10

CITATIONS

Cases:

City of Chicago v. *United States*, Nos. 101 and 102, this Term, decided December 9, 1969 7

Long Island R. Co. v. *New York Central R. Co.*, 281 F. 2d 379 8

Nelson, Inc., v. *United States*, 355 U.S. 554 8

Piedmont & Northern Ry. Co. v. *United States*, 280 U.S. 469 7

Porter v. *Lee*, 328 U.S. 246 9

Powell v. *United States*, 300 U.S. 276 8

Riss & Co. v. *United States*, 117 F. Supp. 296, affirmed *per curiam*, 346 U.S. 890 8

Rochester Telephone Corp. v. *United States*, 307 U.S. 125 ..... 5, 6

Texas & Pacific Ry Co. v. *Gulf, Colorado & S.F. Ry. Co.*, 270 U.S. 266 9

United States v. *Interstate Commerce Commission*, 337 U.S. 426 8

United States v. *Maher*, 307 U.S. 148 7

United States v. *Southern Ry. Co.*, 364 F. 2d 86, certiorari denied, 386 U.S. 1031 8

United States v. *Southern Ry. Co.*, 380 F. 2d 49 8

Western Pac. Cal. R. Co. v. *Southern Pacific Co.*, 284 U.S. 47 9

Statutes and rule:

Interstate Commerce Act, Section 1(18), 49 U.S.C. 1(18), *et seq* 1, 2, 4, 5, 6, 7, 8, 9

Section 1(20) 1, 2, 4, 5, 6, 7, 8, 9

Section 1(22) 3, 4, 5

Urgent Deficiencies Act, 28 U.S.C. 1336, 2321–2325 ..... 6, 7, 9, 10

28 U.S.C. 2283 ..... 2, 5, 6, 9

Rules of Supreme Court of the United States, Rule 42(4) 2

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 877

TAMPA PHOSPHATE RAILROAD COMPANY, PETITIONER

v.

SEABOARD COAST LINE RAILROAD COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

The decision of the court of appeals in this private litigation deals—we believe correctly—with the procedures for review of a determination by the Interstate Commerce Commission that it has jurisdiction to deny permission for proposed rail construction, and with the effect that such a determination has in collateral litigation. The court held that the Commission's determination that a proposed rail line is in interstate commerce and not exempted under the Interstate Commerce Act may be attacked only on direct review by a three-judge court and not by way of defense to a suit under Section 1(20) of the Act for an injunc-

372-940—69

tion against unauthorized rail construction; it further held that an injunction issued under Section 1(20) against state condemnation proceedings initiated as a step in railroad construction comes within the exception to the anti-injunction statute, 28 U.S.C. 2283, for injunctions "expressly authorized by Act of Congress * * *" and is not barred by more general principles of comity.

Following the oral argument below, the court of appeals requested the United States and the Interstate Commerce Commission to file a brief expressing their views on these questions and they did so. The court's opinion substantially adopted the views expressed in the government's brief. Accordingly, we consider it appropriate to file this memorandum, pursuant to Rule 42(4), to express the support of the United States and the Interstate Commerce Commission for the decision below.

STATEMENT

On July 1, 1965, the Tampa Phosphate Railroad Company (Tam-Phos), a corporation which proposed to build a railroad, filed an application with the Interstate Commerce Commission pursuant to Section 1(18) of the Interstate Commerce Act, 49 U.S.C. 1 (18),[1] for a certificate of convenience and necessity permitting it to construct a 30-mile railroad line from a point in Polk County, Florida, to Port Sutton, Florida, on Tampa Bay, for the transportation of

[1] The pertinent statutory provisions are set forth in the petition (Pet. 9–13).

phosphate rock and phosphate products (Pet. App. 45–46).[2] In the alternative Tam-Phos asked the Commission to dismiss its application on the grounds that the line would be operated exclusively in *intra*state commerce (and thus beyond the jurisdiction of the Commission) and that it would constitute a spur or industrial track wholly within one state (and thus be exempt from the certificate requirement under Section 1(22)) (Pet. App. 51–52).

After oral hearings, the Commission's examiner held that Tam-Phos' proposed line would be in *inter*state commerce and would not be an exempt spur or industrial track (Pet. App. 116–121). He further found that the proposed line was not required by the public convenience and necessity (Pet. App. 128, 130). In an order served August 7, 1967, the Commission adopted the examiner's recommendations and denied the Tam-Phos application (Pet. App. 147).[3] Tam-Phos did not seek judicial review of the Commission's decision (Pet. App. 157).

While the matter was still before the Commission, Tam-Phos began condemnation proceedings in the Florida state courts seeking easements under state law for construction of the proposed line over existing tracks of the Seaboard Coast Line Railroad Company

[2] "Pet. App." refers to the separately bound Appendix to the petition.

[3] A similar proposal of the Seaboard Coast Line Railroad also before the Commission was dismissed as moot, because the Supreme Court of Florida had invalidated the bond issue necessary for construction of the port terminus Seaboard proposed to use (Pet. App. 148).

(Seaboard). In these state actions, Seaboard moved for dismissal on the grounds, *inter alia,* that the proposed line did not have the necessary Commission certificate. In one of the condemnation suits, the state court, apparently reserving its ruling on Seaboard's motion to dismiss, scheduled the matter for trial on December 18, 1967 (Pet. App. 7, 155).

In November 1967, Seaboard filed an action in the United States District Court for the Middle District of Florida, pursuant to Section 1(20) of the Interstate Commerce Act, seeking to enjoin Tam-Phos from continuing the condemnation proceedings and from constructing or operating any railroad facilities without the certificate required under Section 1(18). On December 14, 1967, the district court denied Tam-Phos' motion to dismiss and granted a preliminary injunction against further prosecution of the condemnation suits. In so doing, the court held, *inter alia,* that Seaboard was a "party in interest" entitled to sue under Section 1(20) and that the proposed line would not be a spur or industrial track within the Section 1(22) exemption. However, it reserved judgment on Tam-Phos' further defense that the proposed line was not within the Commission's jurisdiction. Although this contention had already been considered and rejected by the Commission, the district court indicated its intention to reexamine it *de novo* (Pet. App. 156–163).

On Tam-Phos' appeal from the preliminary injunction, the court of appeals sustained the jurisdiction of the district court to enjoin further prosecution of the state condemnation suits (Pet. App. 3–40). It

held that the anti-injunction statute, 28 U.S.C. 2283, was no bar to an injunction under Section 1(20), since such an injunction is "expressly authorized by Act of Congress"[4] (Pet. App. 9–15). It also held that because the state condemnation suit involved a subject matter different from the federal action, and was not an exercise of concurrent jurisdiction, the injunction was not barred by any principle of comity between federal and state courts (Pet. App. 15–19).

Because the district court had indicated its intention to try *de novo* the interstate commerce question already ruled on by the Commission, the court of appeals went on to consider, in the interests of judicial economy, the appropriateness of this course. It held that Tam-Phos could have obtained review of the Commission's ruling in a three-judge district court; any authority to the contrary had been overruled when the negative order doctrine was abolished by *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125. Since the issues of interstate commerce for purposes of Section 1(18) and of whether the proposed construction involves a spur or industrial track exempt under Section 1(22) are committed to the Commission's primary jurisdiction subject to exclusive review in three-judge court, the court held that the principle of collateral estoppel bars relitigation of these questions before a single judge in an enforce-

[4] 28 U.S.C. 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court *except as expressly authorized by Act of Congress*, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. [Emphasis added.]

ment action under Section 1(20). It further held that collateral estoppel could be avoided only if Tam-Phos could prove that its proposal had been modified to such an extent as to present a new situation not passed on by the Commission (Pet. App. 30–34). Judge Brown, concurring, joined the court's opinion but stated that in his view, any change in circumstances was required by Section 1(18) to be initially considered by the Commission (Pet. App. 34–40).

DISCUSSION

We believe that the court of appeals gave the proper effect to the Interstate Commerce Commission's determination that the proposed rail construction is subject to the Commission's jurisdiction and should not be authorized. The result accords with modern concepts of judicial review, with the intent of Congress to provide a clear and orderly procedure for review of Commission determinations, and with the standards of comity between state and federal courts defined in 28 U.S.C. 2283. Petitioner's attack upon the sound principles followed by the court of appeals has no merit, and it presents no question warranting further review.

1. The Commission's decision denying petitioner a certificate of public convenience and necessity for new construction under Section 1(18), 49 U.S.C. 1(18), is reviewable in a three-judge district court under the Urgent Deficiencies Act (28 U.S.C. 1336, 2321–2325). This is clearly established by the decisions of this Court overruling the "negative order doctrine". *Rochester Telephone Corp.* v. *United States,* 307 U.S.

125;[5] *United States* v. *Maher,* 307 U.S. 148. Thus petitioners had—and since the Urgent Deficiencies Act contains no statute of limitations, still have—a remedy before a three-judge district court to review the Commission's determinations as to both jurisdiction and the merits.

2. Petitioners' right to review lies exclusively before a three-judge district court; the Commission's determination may not be collaterally attacked in defense of a suit under § 1(20). This follows necessarily from the statutory scheme. First, since actions under Section 1(20) may be brought in "any court of competent jurisdiction" either federal or state, the result of allowing them to serve as a vehicle for review would be that not only single-judge district courts but also state judicial systems would be reviewing Commission actions; this would plainly be inconsistent with the careful scheme of the Urgent Deficiencies Act, with its provision for review of Commission determinations by three-judge federal district courts and direct appeal to this Court. Moreover, since a protesting party could obviously not challenge the Commission's grant of a certificate by a suit under § 1(20), the result of allowing such a review to a disappointed applicant would be to make available forums for review vary according to the affirmative or negative nature of a Commission ruling; this would be both unreasonable and unfair. Cf. *City of Chicago* v. *United States,* Nos. 101 and 102, this

[5] In *Rochester*, the Court specifically overruled *Piedmont & Northern Ry. Co.* v. *United States*, 280 U.S. 469, which had held a denial of a certificate for new construction under § 1(18) unreviewable.

Term, decided December 9, 1969; *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 443.

The rule against collateral review of Commission orders has been recognized in numerous decisions, *e.g. Nelson, Inc.* v. *United States,* 355 U.S. 554, 562; *Riss & Co.* v. *United States,* 117 F. Supp. 296, 301 (W.D. Mo.), affirmed *per curiam,* 346 U.S. 890; *United States* v. *Southern Ry Co.,* 380 F. 2d 49, 53–55 (C.A. 4); *United States* v. *Southern Ry. Co.,* 364 F. 2d 86, 91–93 (C.A. 5) certiorari denied, 386 U.S. 1031. To the extent that *Powell* v. *United States,* 300 U.S. 276, may be read as holding a Commission order denying a certificate reviewable in a proceeding under Section 1(20)—*i.e.,* where despite Commission denial, the applicant proceeded with construction—its authority was, as the court of appeals explained (Pet. App. 23–25), overruled when the negative order doctrine was abolished. In any event, neither *Powell,* nor *Long Island R. Co.* v. *New York Central R. Co.,* 281 F. 2d 379 (C.A. 2), which followed it, directly involved a Commission ruling on an application under Section 1(18). The issue in both cases concerned Commission approval of certain tariffs with subsidiary comments as to whether a certificate was required under Section 1(18). Neither case squarely holds that a Commission determination under Section 1(18) may be collaterally challenged in a suit under Section 1(20).

3. The court below correctly held that Tam-Phos could not evade the Commission's ruling that its proposal requires certification under Section 1(18) by starting condemnation suits in the state courts in-

stead of seeking review of the Commission's order under the Urgent Deficiencies Act. As the court of appeals found, the condemnation suits represented crucial initial steps in the very construction which the Commission had declined to authorize. As such they were enjoinable under Section 1(20) at the suit of the United States, the Commission, affected state regulatory bodies, or "any party in interest." This suit was therefore properly filed before a single judge federal district court by Seaboard, a competing carrier with standing to vindicate the public interest expressed in Sections 1(18) and 1(20) against improvident expansion of the nation's rail plant. See *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & S. F. Ry. Co.*, 270 U.S. 266; *Western Pac. Cal. R. Co.* v. *Southern Pacific Co.*, 284 U.S. 47, 50–51. The condemnation suits were not insulated from the jurisdiction of the federal court by the anti-injunction statute, 28 U.S.C. 2283, because that court's writ squarely falls within the exception for injunctions "authorized by Act of Congress." Nor were the condemnation actions insulated on general grounds of comity. The subject matter of the condemnation suits and the Section 1(20) suit were entirely different; even though Seaboard raised "interstate commerce" as a defense in the state court, that defense did not convert the suits into Section 1(20) actions. Cf. *Porter* v. *Lee*, 328 U.S. 246.

4. The history of the case illustrates the kind of purposeless legal tangle which could result from any course other than the simple and forthright procedure set forth in the decision below. Three forums—the

Commission, the state condemnation courts, and the federal district court—were presented with claims that the proposed construction was not in interstate commerce. Although that issue had already been litigated and decided in the Commission, the state court and subsequently the single-judge federal court were prepared to litigate it again. The resulting delay and confusion could have been avoided if Tam-Phos, which initially had invoked the Commission's jurisdiction, had sought review of its determinations in an orderly manner under the Urgent Deficiencies Act.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
RICHARD W. MCLAREN,
Assistant Attorney General.
HOWARD E. SHAPIRO,
W. RICHARD HADDAD,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
JEROME NELSON,
Attorney,
Interstate Commerce Commission.

JANUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

PREME COURT, U. S.

JAN 21 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 877

TAMPA PHOSPHATE RAILROAD COMPANY,
Petitioner.

—vs—

SEABOARD COAST LINE RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

JAMES B. MCDONOUGH, JR.
DAVID C. G. KERR
of MACFARLANE, FERGUSON, ALLISON & KELLY
Attorneys for Petitioner

512 Florida Avenue,
P.O. Box 1531
Tampa, Florida 33601

FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

IN THE

Supreme Court of the United States

October Term, 1969

No. 877

TAMPA PHOSPHATE RAILROAD COMPANY,

Petitioner,

—vs—

SEABOARD COAST LINE RAILROAD COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONSE OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

The Memorandum for the United States and the Interstate Commerce Commission as Amici Curiae (Memorandum) deals largely with the discussion by the Court of Appeals of the procedures for review of a determination by the Interstate Commerce Commission (Commission) as to its own jurisdiction to proceed to determine whether to grant or deny a certificate under Section 1(18).[1] The petitioner has repeatedly

[1] All statutory and other references in this Response are the same as in the Petition.

sought to make clear, and makes this last effort to show, that the procedures for review of Commission orders are foreign to the issue presented by this Petition and the Petitioner has not sought and is not now seeking a review of any order of the Commission.

The issue presented to this Court is whether or not the power of the Florida courts, as courts of general jurisdiction, to determine whether the conditions essential to the exercise of their jurisdiction exist[2] is protected by Section 2283 against interference by the District Courts of the United States. The condition essential to the exercise by the state courts of their jurisdiction is that the commerce in which Tampa proposes to engage is intrastate in character. In this case the state courts have not been permitted even to make that *initial* determination, both by the Federal district court and by the Court of Appeals, but the Court of Appeals went beyond the District Court and held that even the single judge Federal district court could not make that initial determination of its own jurisdiction.

The basis of the decision of the Court of Appeals was that the making of that determination would constitute a *review* of an order of the Commission, and that orders of the Commission could only be *reviewed* by a three judge Federal district court convened under the Urgent Deficiences Act. This is a semantical trap which would be ludicrous if it were not so serious. The three judge Federal court review upon the administrative record is exactly what it is called, a "review". It is not

---

[2] This is the language used by this court in *Texas & P. R. Co. v. Gulf, C. & S. R. Co.*, 270 U.S. 266, 274, 46 S. Ct. 263, 70 L. Ed. 578, 582.

the making of a judicial determination but is only the review of an administrative determination already made with which the reviewing court is not empowered to disagree if there is *any* evidence to support the administrative finding.

The Commission is an administrative agency, not a court, and it has been uniformly recognized for many years that its finding of its own jurisdiction was not conclusive upon any court, state or federal, in any proceeding in which the issue of the Commission's jurisdiction was properly presented or necessarily arose (*Texas & Pacific,* supra Note 2). The Federal courts may surrender their Federal judicial power to the administrative agency, if they wish[3] but the Federal courts have no like power to surrender the state judicial power to the administrative agency and all the discussion of the procedures available to review orders of the Commission is wholly irrelevant to the issue presented to this Court by this petition for certiorari.

It is not now known whether the judicial determination of the state courts if and when permitted to be made will agree or disagree with the administrative findings of the Commission, for the simple reason that the state courts have not been permitted to adjudicate, and the Court of Appeals has held in this case that *no court,* state or Federal may now *adjudicate* the matter, and that only the one special Federal court may even exercise the limited *review* of the administrative finding by the agency of its own jurisdiction.

---

[3] As the Fifth Circuit and the Fourth Circuit have done in the *Southern Railway* cases, *United States v. Southern Railway Co.*, 364 F.2d 86 (CA 5th, 1966), and *United States v. Southern Railway Co.*, 380 F.2d 49 (CA 4th, 1967), see Note 3 to the Petition (p. 7), and the reference to those cases in the opinion of the Court of Appeals (A. 25-28).

The Memorandum and the opinion of the Court of Appeals appear to be instinct with the fear that the state court (and the one judge Federal court, for that matter) will, if permitted to proceed, adjudicate that the commerce is intrastate in character and thereby bring to naught the administrative labor of the Commision, and that even the *possibility* of that result presents a case of judicial usurpation of power by the *nisi prius* courts of general jurisidiction.

Petitioner respectfuly submits that the contrary is the case, that the opinion of the Court of Appeals on the one hand arrogates to the Federal administrative agency a judicial power that it does not possess, and on the other hand takes away from the state courts judicial power that antedates the Federal constitution and has been recognized and protected by the present Section 2283 and its predecessors continuously since 1789, and that the method of review of orders of the Interstate Commerce Commission does not control the fundamental issue which is only and solely the extent of the protection afforded the state courts by Section 2283.

Dated at Tampa, Florida
January 20, 1970

Respectfully submitted,

JAMES B. MCDONOUGH, JR.
DAVID C. G. KERR
Of MACFARLANE, FERGUSON,
ALLISON and KELLY
Attorneys for Petitioner

512 Florida Avenue
P. O. Box 153
Tampa, Florida

CERTIFICATE OF SERVICE

I DO CERTIFY that on this 20th day of January, 1970, one copy of the foregoing Response was furnished by mail to William A. Gillen, Esq., and one copy also by mail to James E. Thompson, Esq., both of Messrs. Fowler, White, Collins, Gillen, Humkey and Trenam, First Federal Building, Tampa, Florida, attorneys for respondent Seaboard Coast Line Railroad Company, and that one copy of the same was furnished by air mail with postage prepaid to Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C., and in like manner one copy each was furnished to Richard W. McLaren, Asistant Attorney General, and Howard E. Shapiro and W. Richard Haddad, Attorneys, Department of Justice, Washington, D. C. and in like manner one copy each to Robert W. Ginnane, General Counsel, and Jerome Nelson, Attorney, Interstate Commerce Commission, Washington, D. C., and that copy has also been furnished by air mail with postage prepaid to the Clerk of the United States Court of Appeals for the Fifth Circuit, 400 Royal Street, New Orleans, Louisiana.

s/James B. McDononugh, Jr.

TABLE OF CONTENTS

Page

Petition for Rehearing on Denial of Certiorari 1

Conclusion 10

Certificate under Rule 58 11

Certificate of Service 12

Appendix (Circuit Court, Polk County, orders)

Order of December 22, 1969 ..... A-1

Order of March 2, 1970 ..... A-3

TABLE OF CASES

Brotherhood of R. Trainmen v. *Terminal Co.*, 394 U.S. 369, 89 S. Ct. 1109, 22 L.Ed 2d 344 (March 25, 1969) 2

Seaboard Coast Line R. Co. v. *Brotherhood of of Locomotive Engineers, et al.*, No. 477 before this court 2, 5

Tampa Phosphate R. Co. v. *Seaboard Coast Line R. Co.*, 418 F. 2d 387 (CA 5th, 1969) 2

IN THE

Supreme Court of the United States

OCTOBER TERM 1969

NO. 877

TAMPA PHOSPHATE RAILROAD COMPANY,
Petitioner,

vs.

SEABOARD COAST LINE RAILROAD COMPANY,
Respondent.

PETITION FOR REHEARING ON DENIAL OF CERTIORARI

Petitioner herein, Tampa Phosphate Railroad Company (Tampa) pursuant to Rule 58 of the Rules of the Supreme Court prays rehearing of the order of February 24, 1970, denying Tampa's petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and respectfully shows:

1. The petition for certiorari was filed on November 24, 1969, and denied on February 24, 1970, and subsequently to the filing there have been intervening circumstances showing that the opinion of the Court of Appeals of which review is sought presents serious questions as to the extent of the supervisory or appellate power of the United States District Courts over the initial exercise by the state courts of their inherent jurisdiction where the power of the United States District Courts to interfere with and supervise state judicial

action in disregard of 28 U.S.C. §2283 is drawn from court-formulated "paramount federal policies" and "paramount federal interests" rather than, "as expressly authorized by Act of Congress."

2. The source of the power to disregard §2283 was found in court-formulated "paramount federal policies" in *Brotherhood of R. Trainmen* v. *Terminal Co.*, 394 U.S. 369, 89 S.Ct. 1109, 22 L.Ed 2d 344 (March 25, 1969); but that decision was by a seven-judge court which divided four to three, and the then Chief Justice, one of the majority of four, is no longer on the Court, and whether such power does exist is again before this court in No. 477, *Seaboard Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, et al, argued March 2 and 3, 1970.

3. In the instant case, the source of the power to disregard §2283 was found by the Court of Appeals to exist in "paramount federal interests" (A. 15).[1] The extent of such non-statutory power to disregard §2283 is squarely presented by the instant case as well as by No. 477, *Seaboard Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers et al*, now upon the breast of the Court, and in each case that serious question of Federal law should be passed upon and decided by this Court. In No. 477, if the Federal injunction does not fall within the ban of Norris-LaGuardia (29 U.S.C. §§101, et seq.) it would seem that the issue of court-formulated power to disregard §2283 cannot be escaped.

4. We point out below that in this case both the suggestion of the Court of Appeals on the one hand, and the suggestion of the Department of Justice and the

---

[1] The opinion of the Court of Appeals is now reported in the Federal Reporter advance sheets of February 2, 1970, as *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F 2d 387 (CA 5th October 1, 1969, rehearing denied October 24, 1969). The adoption of the "paramount federal interests" test is found on page 394 of the advance sheet, but references herein are to the opinion as printed in the Appendix (A. 15).

Interstate Commerce Commission on the other hand, either of which would ordinarily be grounds for refusing certiorari, are illusory. The Court of Appeals remanded the cause to the District Court for further proceedings not inconsistent with its opinion, saying in the same breath that it doubted if further proceedings were possible without the consent of the Interstate Commerce Commission, while the Department of Justice and the Interstate Commerce Commission, as grounds for refusing certiorari, argued that no statute of limitations had run against the convening of a three-judge District Court under the Urgent Deficiencies Act and that Tampa's remedy was to have the Commission's order reviewed before such a court.

5. The Court of Appeals said that Tampa, *by means of a unilateral decision,* should not be permitted to modify its proposed railroad (A. 33). Does the Court of Appeals actually mean that Tampa must get the consent of the Interstate Commerce Commission to modify its proposal? Tampa carefully amended the complaints in the condemnation actions and its proposal so as to limit both to intrastate commerce, a course which the opinion of the Court of Appeals calls a "gambit" and forbids (A. 34). The resort to the Commission became an imprisonment.

6. Tampa does not seek to operate in interstate commerce. Tampa seeks a judicial determination in the state courts under the state condemnation statutes that its proposal as amended is in intrastate commerce entitling it to invoke the power of the state courts to permit it to cross with its track the track of the Seaboard Coast Line upon the payment of just compensation. If

Tampa was condemning non-railroad property for its proposed intrastate operation would the state courts be impotent to determine their own jurisdiction to proceed?

7. The suggested remand by the Court of Appeals to the Federal district court, which Chief Judge Brown said would be a "water haul" for Tampa (A. 40), and the suggested convocation of a three-judge district court, would serve no purpose but delay. The federal question is now properly before this Court on this petition for certiorari and should be decided at this time.

8. Upon remand, the District Court would be compelled to find (a) that Tampa had not secured the permission of the Interstate Commerce Commission to modify and limit its proposal to intrastate commerce and (b) that the Court of Appeals had said that neither the District Court nor the state courts were competent to try the issue as to the character of the commerce in the absence of such permission, so that the present preliminary injunction (A. 156-162) would be made permanent and would of course be affirmed by the Court of Appeals, and, a year or two from now, Tampa would again be before this Court by certiorari, pointing out that both opinions of the Court of Appeals were in unwarranted disregard of §2283.

9. The convocation of a three-judge district court would not decide the question, as presumably the injunction issued by the District Court as modified by the Court of Appeals would remain in effect, with further proceedings in the District Court stayed. Upon review by the three-judge district court, there would obviously be *some* evidence to support the Commission's finding of no public necessity and convenience for operation *in interstate commerce,* which finding would consequently be upheld by the three-judge district court and the preliminary injunction would thereupon be made permanent

by the one judge district court and a year or so later Tampa would again be before this Court, this time by both certiorari and direct appeal.

10. The intervening circumstances are found in (A) the jurisdiction *presently being exercised* by the Circuit Court of Polk County, Florida,[2] the very court enjoined in this case, with trial set for May 20, 1970, to decide the very question as to the character of the very traffic to Port Sutton, which the Court of Appeals, and this Court by denial of certiorari, refuse to permit that very same state court to pass upon in Tampa's case, and (B) the oral argument before this Court on March 2 and 3, 1970, in the case No. 477, *Seaboard Coast Line R. Co. v. Brotherhood of Locomotive Enginers, et al.*

11. The state court action in which that jurisdiction is being exercised is a suit for overcharges brought by International Minerals and Chemical Corporation against the respondent herein, Seaboard, in the Circuit Court of Polk County, Florida in which the plaintiff should recover if the traffic to Sutton is intrastate. The complaint in that action is reproduced in pertitioner's Appendix (A. 187).

12. The Claim for undercharge was made by letter dated May 26, 1969 (A. 176). Following receipt of that claim Seaboard applied, on July 16, 1969, to the Interstate Commerce Commission, advising the Commission of that claim and asking for a declaratory order that the traffic involved was interstate in character for all purposes (A. 172), alleging that that question had been decided by the Commission in Finance Docket No. 23688, which embraced Finance Docket No. 23718, the very Finance Docket in which the Commission, for the pur-

---

[2] Orders of December 22, 1969, and March 2, 1970, reproduced in the Appendix hereto (Appendix herewith, p 1-3).

pose of asserting its jurisdiction and denying Tampa's motion to dismiss its own application, found the traffic to be interstate (A. 118-119). The Commission, however, by order dated October 28, 1969 (A. 194), "in the exercise of our discretion in this matter, in which the issue is now before the court" refused to issue the requested declaratory order (A. 194).

13. The Court of Apppeals in Tampa's case refused to let that very state court inquire into the character of the traffic because the Commission had found it to be interstate. The Commission refused to issue a declaratory order that the traffic was interstate because that very issue was pending before that very state court in the undercharge suit. If the state court had no jurisdiction in Tampa's condemnation action, because of that decision in Finance Docket No. 23688, does the state court have jurisdiction in the undercharge action solely because the Interstate Commerce Commission now refuses to say what it did hold in Finance Docket No. 23688? The result is a procedural shambles which this Court should resolve.

14. The complaint in the undercharge action is reproduced in Petitioner's Appendix herein (A. 187) as are also the Seaboard's Motion to Dismiss, Motion to Strike and Motion for More Definite Statement (A. 192), which motions had not been ruled upon by the state court at the date of the petition for certiorari herein. Those motions have now been ruled upon by the state court, by order of the Circuit Court of Polk County dated December 22, 1969, of which a copy is annexed hereto (Appendix herewith, p. 1).

15. The respondent Seaboard's motion to dismiss the undercharge case was made on the grounds that the state court lacked jurisdiction to determine whether the character of the movement of the phosphate rock to Sutton was intrastate or interstate for the reason that

the exclusive or primary jurisdiction to determine that question is in the Interstate Commerce Commission or the Florida Public Service Commission, and, furthermore, that, "it affirmatively appears from the allegations of the Complaint that the shipments involved are shipments in interstate commerce." (A. 192)

16. The state court denied the Seaboard's motion to dismiss (Appendix hereto, p. 1) saying:

> "The Court heard the arguments of counsel for the parties and, after consideration, concludes, concerning the Motion to Dismiss, that this Court has jurisdiction of the subject matter of the complaint; that the exclusive or primary jurisdiction of the subject matter of the complaint is not vested in the Interstate Commerce Commission or the Florida Public Service Commission; that it does not affirmatively appear from the allegations of the complaint that the shipments involved are shipments in interstate commerce; and that the complaint states a cause of action."

The ordering paragraph denied the motion to dismiss in its entirety. The order also denied the motion for a more definite statement on the ground that the information requested could be obtained by interrogatories and depositions, but granted the motion to strike the portion of the prayer for relief seeking penalties of 50% and attorneys fees (Appendix hereto, p. 1-2).

17. Seaboard then served Requests for Admissions on February 3, 1970, requesting admissions, among other things, that the phosphate rock (3b) "is not intended to come to final rest in Sutton, Florida", (3c) "is not intended to come to final rest in the State of Florida", and (3g) "is not to be transported to any final resting place

in Florida". Objections to those requests were made and sustained by the state court by order dated March 2, 1970, in which that court said:

> "The Court has heard the argument of counsel for the parties and has concluded that the requests for admissions to which plaintiff has objected request the admission of conclusions of law and fact and request the admission of controverted central issues of fact which might be dispositive of the cause. As such, it is the opinion of the Court that such requests are improper and the plaintiff's objections should be sustained."

Copy of that order is attached (Appendix hereto, p. 3).

18. If there is a judicial determination in the undercharge case that the traffic is intrastate in character, how is Tampa to get into *any* court to present the same evidence that was produced in that case? The Court of Appeals has absolutely precluded Tampa from going into the state court, has said that Tampa may not produce additional or different evidence in the Federal one-judge district court absent the consent of the Interstate Commerce Commission, and, as a matter of settled law, evidence in addition to that presented to the Commission is not permitted before a three judge district court convened under the Urgent Deficiencies Act.

19. The undercharge case in the Circuit Court of Polk County is now in precisely the same procedural status as was Tampa's Polk County condemnation action when the Federal District Court stepped in and stopped further proceedings. Up to the moment of writing, however, Seaboard has not yet applied to the Federal District court to stay further proceedings in the undercharge case, although it has between now and May 20,

1970 to do so and to bring about the same result, if this Court upholds the exercise by the Federal District Court of that power upon court-formulated notions of paramount federal interests.

20. The opinion of the Court of Appeals in this case requires correction by this Court for reasons far beyond the fact that it is, as we contend, plainly wrong. If the *nisi prius* state court goes wrong, in No. 477 as well as in this case, there is appellate review in the state courts and final scrutiny by this Court on certiorari. The damage of the opinion of the Court of Appeals is the extension of the power of the Federal district courts to restrain and supervise the state courts, not by virtue of express authority of an Act of Congress but upon court-formulated notions of paramount federal policies and paramount federal interests.

21. At the oral argument in No. 477 counsel for the Brotherhood repeatedly referred to the "totality" of the regulation of the Florida East Coast as making the situation disclosed in No. 477 "the strongest case possible" for limiting the application of state law and overriding the state court injunction, by leaving in force the counter-injunction of the Federal District Court. The argument was that the Federal government had an "enormous" stake in seeing that the Brotherhood was able to possess and use its economic power to prevent the receipt and delivery of freight by the Florida East Coast and to bring the Florida East Coast to its knees. That argument was simply a request for the same court-formulated extension of the power of the Federal district courts, which, ironically, the Seaboard resists in No. 477 and supports in No. 877.

CONCLUSION

The facts that the Interstate Commerce Commission has refused to intervene when asked by Seaboard because the question is pending before a court and that the Circuit Court of Polk County is proceeding to adjudicate the character of the commerce, show on their face that the reasons given by the Court of Appeals for preventing the resolution of the same question by the same court at the instance of Tampa are specious.

It is respectfully submitted that the encroachment by the Federal district courts in No. 477, and in this case, No. 877, upon the admitted inherent jurisdiction of the state courts, threatens the destruction of the traditional relationships of the Federal and state courts, and that this case, particularly because of the exposition in the opinion of the Court of Appeals, as well as the situation disclosed in No. 477, call for the review and restraint by this Court of such encroachment and that this petition for rehearing should be granted.

Dated at Tampa, Florida March 18, 1970.

Respectfully submitted,

s/ JAMES B. MCDONOUGH, JR.

JAMES B. MCDONOUGH, JR.
DAVID C. G. KERR
of MACFARLANE, FERGUSON, ALLISON AND KELLY
Attorneys for Petitioner,
Tampa Phosphate Railroad Company
P. O. Box 1531, 512 Florida Avenue
Tampa, Florida

CERTIFICATE UNDER RULE 58

The undersigned, pursuant to the requirement of Rule 58 of the Rules of this Court, hereby certifies that this Petition for Rehearing on Denial of Certiorari is presented in good faith and not for delay, and that it is restricted to intervening circumstances of substantial or controlling effect and other substantial grounds available to Petitioner although not previously presented.

Dated at Tampa, Florida, March 18, 1970.

/s/ James B. McDonough, Jr.

JAMES B. MCDONOUGH, JR.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 18th day of March, 1970, one copy of the foregoing Petition for Rehearing was furnished by mail to William A. Gillen, Esq., and one copy also by mail to James E. Thompson, Esq., both of Messrs. Fowler, White, Gillen, Humkey and Kinney, First Federal Building, Tampa, Florida, attorneys for respondent Seaboard Coast Line Railroad Company, and that one copy of the same was furnished by air mail with postage prepaid to Erwin N. Griswold, Esq., Solicitor General, Department of Justice, Washington, D. C., and in like manner one copy was furnished to John H. D. Wigger, Esq., Department of Justice, Washington, D. C., and in like manner one copy each to Robert W. Ginnane, Esq., and Jerome Nelson, Esq., Counsel for the Interstate Commerce Commission, Washington, D. C. and that copy has also been furnished by air mail with postage prepaid to the Clerk of the United States Court of Appeals for the Fifth Circuit, 400 Royal Street, New Orleans, Louisiana.

s/ James B. McDonough, Jr.

Counsel for Petitioner

APPENDIX

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR POLK COUNTY, FLORIDA.
CIVIL ACTION

INTERNATIONAL MINERALS & CHEMICAL CORPORATION, a New York corporation,
Plaintiff,

vs.) CASE NO. 69-2560

SEABOARD COAST LINE RAILROAD COMPANY, a Virginia corporation,
Defendant.

ORDER

This matter came before the Court on December 18, 1969 for hearing on defendant's Motion to Dismiss, Motion to Strike, and Motion for More Definite Statement. The Court heard the arguments of counsel for the parties and, after consideration, concludes, concerning the Motion to Dismiss, that this Court has jurisdiction of the subject matter of the complaint! that the exclusive or primary jurisdiction of the subject matter of the complaint is not vested in the Interstate Commerce Commission or the Florida Public Service Commission; that it does not affirmatively appear from the allegations of the complaint that the shipments involved are shipments in interstate commerce; and that the complaint state a cause of action. Concerning the Motion to Strike, the Court concludes paragraph 9 of the complaint, as alleged in Count I and realleged by reference in Count II, does not contain allegations which, if proven, would be sufficient to justify plaintiff's claim for interest at the rate of 50% per annum in accord with the provisions of Sections 353.01 and 353.02, Florida Statutes, or plaintiff's claim

for attorneys' fees in accord with the provisions of Section 353.03, Florida Statutes. Concerning the Motion for More Definite Statement, the Court concludes that the information which is requested in the Motion for More Definite Statement can be obtained by interrogatories and depositions in accord with the provisions of the Florida Rules of Civil Procedure; and that the complaint is not so vague or ambiguous that defendant cannot reasonably be required to frame a responsive pleading thereto. It is accordingly,

ORDERED AND ADJUDGED that defendant's Motion to Dismiss is denied in its entirety. It is further,

ORDERED AND ADJUDGED that defendant's Motion to Strike is granted. Paragraph 9 will be stricken from both Count I and Count II of the complaint. That part of the prayer for relief of Count I which reads "plus interest at the rate of 50% per annum from May 26, 1969; attorneys' fees in an amount not to exceed 15% of the amount recovered;" will be deleted also. It is further,

ORDERED AND ADJUDGED that defendant's Motion for More Definite Statement is denied.

DONE AND ORDERED in Chambers at Bartow, Polk County, Florida, this 22nd day of December, 1969.

/s/ J. H. Willson

As Circuit Judge

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR POLK COUNTY, FLORIDA.

CIVIL ACTION

INTERNATIONAL MINERALS & CHEMICAL CORPORATION, a New York corporation,
Plaintiff,

vs.) CASE NO. 69-2560

SEABOARD COAST LINE RAILROAD COMPANY, a Virginia corporation,
Defendant.

ORDER

This matter came before the Court on February 26, 1970 for hearing on Plaintiff's Objections to Defendant's Requests for Admissions Numbers 3(b), 3(c), and 3(g), served on plaintiff on February 19, 1970.

The Court has heard the argument of counsel for the parties and has concluded that the requests for admissions to which plaintiff has objected request the admission of conclusions of law and fact and request the admission of controverted central issues of fact which might be dispositive of the cause. As such, it is the opinion of the Court that such requests are improper and that plaintiff's objections should be sustained. It is, therefore,

ORDERED AND ADJUDGED that Plaintiff's Objections to Defendant's Requests for Admissions Numbers 3(b), 3(c), and 3(g) are hereby sustained.

DONE AND ORDERED in Chambers at Bartow, Florida, this 2nd day of March, 1970.

/s/ J. H. Willson

As Circuit Judge